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Robert Weisberg

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Articles

The Law-Literature Enterprise*

Robert Weisberg

Shelley said that poets are the unacknowledged legislators of the world. Sounds more like the secret police to me.

—W.H. Auden¹

I.A. INTRODUCTION

I want to examine here the contemporary American scholarship on the relations between law and literature. Along the way, I will try to evaluate the success of particular efforts within the enterprise, but my main goal is broader. I will try to define the nature and purpose of this multifold academic enterprise, and to examine and criticize the larger claims that American legal academics are making (sometimes implicitly) about law and culture through the very act of asserting the validity of the joint study of law and literature.

Very crudely divided, the enterprise has two parts, whose shape and relationship I will discuss at length below. The first part is law-*in*-literature. This, of course, involves the appearance of legal themes or the depiction of legal actors or processes in fiction or drama. The other, somewhat more amorphous, part is law-*as*-literature. This involves the parsing of such legal texts as statutes, constitutions, judicial opinions, and certain classic scholarly treatises as if they were literary works. Thus, the law-*as*-

* My thanks to the sponsors of the Yale Legal Theory Workshop, before which I presented an earlier version of this paper.

1. W. H. Auden, late journal entry.

literature critic may assume that there has been conscious authorial control of the semantic and structural complexities of a legal text, and will then subject the intrinsic text to the conventional techniques of "meaning" interpretation normally applied to poems, plays, or novels. Or, somewhat more broadly, and perhaps relaxing the assumption of conscious authorial control, the law-as-literature critic may "situate" legal texts within a culture in a manner parallel to the way literary works are considered parts of a culture's mythologies or moral or spiritual principles.

I should note that, though I will be looking at the law-literature connection from a variety of perspectives, in one key way my terrain is very limited: I am mostly concerned with how the connection is seen to benefit the study of law. Thus, I put aside one large part of law-in-literature: the vast, rich work in conventional historical-based literary scholarship—for example, studies of the criminal justice system in Dickensian England—which is done by literary scholars for the purpose of enhancing appreciation of Dickens in his historical and social context. I put this work aside to the extent that it does not purport to be doing the particular critical or innovative things which self-consciously "interdisciplinary" work claims to do. Such work treats law as an essential part of the social and political world in which fictional and dramatic characters live, and it may often treat law as a trope for the social and moral values of the world of those characters; but it does not necessarily self-consciously reflect on the intersection of law and literature as forms of discourse or as intellectual disciplines.

I.B. INTERDISCIPLINARY SUBVERSION

In both its two chief parts, the law-literature enterprise has been lively and prolix in the last decade, with numerous claims that it has become a major new force in legal scholarship.² I will offer here, however, a somewhat skeptical view. I will argue that much of the law-literature scholarship has produced skimpy intellectual results because it combines overly

2. See, e.g., Smith, *The Coming Renaissance in Law and Literature*, 30 J. Legal Educ. 13 (1979); Smith, *Law and Humanities: A Preface*, 29 Rutgers L. Rev. 223 (1976); Papke, *Neo-Marxists, Nietzscheans, and New Critics: The Voices of the Contemporary Law and Literature Discourse*, 1985 Am. B. Found. Res. J. 883.

For a wonderfully dyspeptic view of the pretenses of the enterprise, see Axelrod, *Law and the Humanities: Notes from the Underground*, 29 Rutgers L. Rev. 228 (1976). Axelrod counsels us to humbly recognize that the grand writers teach lessons far too important to offer help on mundane matters like how to decide legal cases.

An important new survey of the field of law-literature scholarship is the book by Judge Richard Posner, *Law and Literature: A Misunderstood Relation* (1988) [hereinafter R. Posner]. Judge Posner was kind enough to send me his final drafts to aid in my writing this paper on time. His book collects several essays already published in law reviews. The main essays are *Law and Literature: A Relation Reargued*, 72 Va. L. Rev. 1351 (1986); *From Billy Budd to Buchenwald*, 96 Yale L.J. 1173 (1986) (book review); *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W. Res. L. Rev. 179 (1986); *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 Harv. L. Rev. 1431 (1986).

conventional readings of literature with a complacent understanding of law, sometimes masking itself in the self-congratulatory tones of broad cultural understanding. Nevertheless, I think very fertile possibilities remain, where critics develop insights specifically attributable to interdisciplinary study, where they probe for evidence of a constructively mutually subversive relationship between the disciplines, or exploit the law-in-literature connection based on analogically or dialectically sophisticated studies of the role of legal argument or processes in fiction and drama.

As for the other side of the coin, law-as-literature, I will argue that most of this work has also yielded fairly skimpy intellectual benefits. Most of it has sought to exploit the analogy between legal and literary texts by treating legal texts as consciously crafted works of prose that can be appreciated and criticized in terms of explicit or implicit intended meaning. As such, though it has helped to demonstrate some of the rhetorical artistry of great lawmakers, it has bumped up against the obvious, fundamental fact that lawmaking is an intellectual act conditioned by formal political constraints that do not apply to literary expression.

On the other hand, if legal texts are subjected to more flexible modes of analysis, in terms of structural complexity, linguistic patterning, or phenomenology of perspective, the potential of the law-as-literature project is much greater. Equally important, if law is conceived more broadly as a set of "social texts," not self-consciously authorial literary texts, the potential of the law-literature connection is very rich. Yet I will note that even most of the efforts that have fallen into this category, especially the much-discussed work of James B. White³ suffer from a complacently narrow view of textual reading. The result, as with much of the work on the law-in-literature side, has often been somewhat complacent rationalization about law embedded in the rhetoric of critical insight or cultural discovery.

Wholes that merely equal the sums of their parts are not very useful, and some of the wholes here have even been smaller than the sums. The revelation of a connection between disparate forms of discourse is really illuminating only when discomfiting, or, better yet, subversive, because subversion of the *apparent* structure of a culture is precisely what this sort of "social text" approach can contribute. My general assumption, then, is that truly interdisciplinary study, or at least fertile interdisciplinary study, entails discomfiture. As Clifford Geertz has sharply discussed in his essay on the "blurred" generic lines between the social sciences and humanities,⁴ the application of the methods or premises of one discipline to another seems necessarily "discomposing."

3. For discussion of White's work, see *infra* notes 181-205 and accompanying text.

4. C. Geertz, *Local Knowledge* 19-35 (1983).

It is discomposing not only because who knows where it will all end, but because as the idiom of social explanation, its inflections and its imagery, changes our sense of what constitutes such explanation, why we want it, and how it relates to other sorts of things we value changes as well. It is not just theory or method or subject matter that alters, but the whole point of the enterprise.⁵

Thus, as Geertz notes, much social theory of behavior, formerly cast in causal, supposedly scientific terms, gets rewrought as game theory or dramaturgy: society is less a machine than “a serious game, a sidewalk drama, or a behavioral text.”⁶ Simultaneously, the humanist believer in willed and idealistic individual conduct faces discomfiture as well. Supposedly willed political and moral behavior by individuals may appear as unwilled participation in ritual, or willed behavior in the cynical sense of gambling, posing, strategy-playing, or rhetorical manipulation. As Geertz shows in his treatment of Goffman, the reconstruction of the standard explanation of behavior “sits rather poorly with traditional humanistic pieties.” As the foundational assumptions of one discipline become reconstructed according to the assumptions of another, the first discipline loses some of its gravity and independence. Gaming and aesthetic theories of behavior

conduce to a nervous and nervous-making style of interpretation . . . that mixes a strong sense of the formal orderliness of things with an equally strong sense of the radical arbitrariness of that order.⁷

To come back to the specific linkage of law and literature, the scholarship ought to constitute an experiment in reconstructing the aesthetic in legal terms or the legal in aesthetic terms. It might show how literary apprehensions of social or psychological reality borrow from the legal apprehension of social and psychological reality, or it might show some symbiosis or conspiracy between the legal control of political energy and the forms of imaginative cultural meaning-making we normally associate with the literary. Whatever the specific insights, the goal of the scholarship, in Geertz’s terms, should not be to establish “interdisciplinary brotherhood,” but to produce a “conceptual wrench,” or “a sea change in our notion not so much of what knowledge is but of what it is we want to know.”⁸

It may follow that the distinction between law-in-literature and law-as-literature may be more constraining than helpful. The distinction is obviously a useful one in terms of sorting out the scholarship and is descriptively accurate at a very mundane level—some work talks about novels

5. *Id.* at 8.

6. *Id.* at 23.

7. *Id.* at 25, 24.

8. *Id.* at 23, 30, 34.

and plays and some work talks about statutes and constitutions. But I want to start out by questioning the conceptual utility of the distinction viewed in the context of an effort to evaluate the intellectual potential of law-literature scholarship. The best works on the two sides of the line tend to converge, because they constitute the work that captures the best insights about the relationship between the aesthetic and the political-ethical visions and forces in society.

I.C. THE LAW-LITERATURE AXIS

I will return in a short while to the *in-as* distinction as a method for surveying some of the law-literature scholarship. First, though, I want to address the claims underlying law-literature scholarship by asking what it means to argue for a relationship between legal and literary apprehensions of reality. In so doing, I should begin by discussing the extent to which the "mainstream" law-and-literature writing has addressed this "significance." As implicitly conceived in the mainstream work, law-and-literature is an anomalous interdisciplinary relationship that bears little resemblance to the more traditional interdisciplinary relationships between the social sciences (such as economics, sociology, and psychology) and law. With the social sciences, we draw on the other discipline to determine how the law operates or should operate to effect its goals. The social sciences supposedly explain the social phenomena which law seeks to regulate, or evaluate the effects the law is having on those phenomena.

Literature is obviously not an explanatory discipline, though in a certain oblique sense literary criticism is. Let me treat literature more broadly for the moment than the explanatory discipline of criticism. As such, it is not a discipline⁹ at all, but one of the large productions or media of culture. Therefore, we do not directly *use* literature to explain the social phenomena that law must regulate as we use the social sciences.¹⁰ In a rough sense, when we use literature to help explain how law does or should operate, we are not relying on the unique or distinctive value of literature, but instead are using it anecdotally as it mimics sociology or psychology by showing us human life in some dramatically enhanced way.

This "use" of literature in relation to law often takes a somewhat sentimental form. Lawyers are urged to be less abstract and more humane, and to become so by reading great literature that will make them more

9. For a sort of muckraking political history of how F.R. Leavis and others invented "English" as an academic and professional discipline, see T. Eagleton, *Literary Theory: An Introduction* 17-54 (1983).

10. Here I am obviously exaggerating the distinction between literature and social science, because literature, of course, has great and unique analytic power in identifying the moral and social patterns of culture, and has often—Freud's acknowledgment of literary sources is a good example—anticipated or inspired the insights of social science.

sensitive to human foibles, particularly (though not logically necessarily) through literature that actually has law as content.¹¹ But of course, most of the academic practitioners of law-and-literature go further. They recognize that the connection must be something different from the explanatory law-social science connection, that they must be more conceptually and formally self-conscious in defining the connection. The general claim is essentially that law and literature are two parallel cultural phenomena; they are both attempts to shape reality through language, and are both concerned with matters of ambiguity, interpretation, abstraction, and humanistic judgment. They are also both performative activities which require us to engage in some combination of description of reality and ethical judgment. A major law-literature practitioner, James B. White, presents a typical statement:

Law is in a full sense a language, for it is a way of reading and writing and speaking and, in doing these things, it is a way of maintaining a culture, largely a culture of argument, which has a character of its own. . . . [R]eading literature (like reading law) is not merely a process of observing and receiving, but an activity of the mind and imagination, a process that requires constant judgment and creation. Like law, literature is inherently communal: one learns to read a particular text in part from other readers, and one helps others to read it. . . . This is an interpretative culture rather like the culture of argument established by lawyers.¹²

White's approach epitomizes the gentle, communal comparison between law and literature as cultural activities, expressions in language of social and moral value, or efforts through communication to discern or establish social and moral value. And for him, the joint study of law and literature promises a reintegration of the segmented modern mind that makes genuine "cultural criticism" possible. For White, what literature, or any discipline, can contribute to law goes far beyond mere "findings" or explanations. Rather, it is an enrichment of grammars and forms, of phenomenological fields, through which we make our lives. He assumes that the essence of individual and social life is the construction of meaning, and that therefore there are principles of coherence, complexity, and integrity which the moral and political life can draw from aesthetic standards. What would true integration mean?

We would have to accept our situation as individuals, speaking to individuals, out of our situations, with as much truth and urgency as

11. See, e.g., Smith, *The Coming Renaissance in Law and Literature*, 30 J. Legal Educ. 13 (1979); see also Smith, *Law and Humanities: A Preface*, 29 Rutgers L. Rev. 223 (1976).

12. J.B. White, *Heracles' Bow* 78 (1985).

we could manage, and be ready to accept responsibility for the integrity and coherence of our composition and of our voices.¹³

A more specific way of describing the link in White's view between the aesthetic and the moral is to say that White is working in the Arnold-Trilling tradition. To simplify: The role of the artist, and of the intellectual critic who interprets the artist for the wider culture, is to be a constant barometer and prophet of the complexity of ethical meaning inherent in reality; she invokes art as the medium of that complexity against the pressure of the political world that would ignore the complexity. The Trilling model rejects the New Critical aversion to history and politics, but adopts a New Critical approach to them: The writer is to be the barometer of irony, ambiguity, complexity.¹⁴ Trilling's definition of Arnold as a culture hero helps clarify White's highly abstract notion of the link between the legal and the literary:

A man who gives himself in full submission and sacrifice to his historical moment in order to comprehend and control the elements which that moment brings.¹⁵

The intellectual, in William Chace's phrase, becomes the "supervisor of culture," a sort of joint aesthetic-political-moral conscience of his time, exemplifying the virtues of intelligence, tolerance, continuity, skepticism, and so forth. In an interestingly deceptive finesse, Trilling defines the role as essentially raising the consciousness of the middle class.¹⁶ He acts like a public sensibility. In upholding the virtues of aesthetic complexity, he follows the model of Hegel who gave

art an importance quite out of precedent in moral philosophy. For Hegel, art is the activity in which spirit expresses itself, not only as utility, not only according to law, but as grace, as transcendence, as manner and style. He brought together the world and the aesthetic judgment. He did this not in the old way of making morality the criterion of the aesthetic; on the contrary, he made the aesthetic the criterion of the moral.¹⁷

Another view of law and literature as parallel cultural phenomena, focused more specifically on matters of form than White's, comes from Ronald Dworkin. Dworkin argues that the role of literary criticism is to find the way of reading the work that shows it as the best possible work of art it is capable of being. By analogy, the best interpretation of a body or rule

13. White, *Intellectual Integration*, 82 Nw. U.L. Rev. 1, 18 (1987).

14. W. Chace, Lionel Trilling 79-116 (1980).

15. Trilling, *Introduction to The Portable Matthew Arnold* 7 (1949).

16. See W. Chace, Lionel Trilling 98-116 (1980).

17. L. Trilling, *The Opposing Self* xii (1955).

of law is the one that enables it to manifest the soundest principle of social or political philosophy it is capable of embodying.¹⁸ Thus Dworkin, like White, sees a common denominator between ethics and aesthetics, and so finds parallel criteria of integrity and coherence in moral (or legal or ethical) and aesthetic judgments; beauty may indeed be truth. Thus does Dworkin offer a vision of the unity of ethics and aesthetics, implicitly imagining the judge as a political artist, whose work can be judged by relatively formal criteria.¹⁹

Of course, this is a very high and amorphous level of generality on which Dworkin and White operate, and it ignores the one overwhelming difference between law and literature, expressed forcefully by the late Robert Cover²⁰ and more recently by Robin West.²¹ If we take the activity of legal actors—judges in particular—out of context, their work may seem similar to that of writers and artists. But the unfortunately jarring difference is that when judges discern or establish value, they take people's property, liberty, or lives. Of course, artists and writers, in subtler ways, are creating and enforcing ideologies that take life, liberty, and property as well.²² One need not stress that judges or legislators directly inflict violence on people to recognize that morally and politically troublesome implications arise when one argues for the unity of artistic and political behavior. In any event, in this paper I intend to be skeptical of the law-and-literature enterprise for reasons independent of Cover's insight.

I.D. THE REPUBLICAN LAWYER-POET

Thus, rather than rest with the Cover-West argument about the difference between literature and law, I want to examine the vague and somewhat complacent view that Dworkin and White proffer of the relationship between power and aesthetics. To do so, I need a bit of room for historical or cultural whimsy, to imagine a world where in some fully developed sense the ethical or political and the aesthetic are united or coordinated.

The Dworkin-White notions of the relationship between ethical/political and aesthetic value and form offer images of society and culture which are, by and large, happy and comforting. But pursuing this relationship

18. Dworkin, *Law as Interpretation*, 60 Tex. L. Rev. 527, reprinted in *The Politics of Interpretation* 249 (W. Mitchell ed. 1983).

19. Dworkin's view of interpretation has obviously been controversial for its alleged lack of objectivity, for its alleged mere deflection of ideological questions. Bruns, *Law as Hermeneutics: A Reply to Ronald Dworkin*, in *The Politics of Interpretation* 315; Fish, *Wrong Again*, 62 Tex. L. Rev. 299 (1983); Michaels, *Is There a Politics of Interpretation?*, in *The Politics of Interpretation* 334; West, *Adjudication is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 Tenn. L. Rev. 203 (1987).

20. Cover, *The Bonds of Constitutional Interpretation: Of the Word, The Deed, and The Role*, 20 Ga. L. Rev. 815 (1986); *Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983).

21. West, *Adjudication is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 Tenn. L. Rev. 203 (1987).

22. See generally T. Eagleton, *Criticism & Ideology* (1976).

further leads us to images of society and culture which are either (a) attractive but hopelessly anachronistic, or (b) conceivable in the present tense but politically, morally, or psychologically frightening. The consequence is that we should approach the specific study of law and literature with greater sensitivity to and appreciation of the discomfiting and subversive implications of the enterprise.

One model of a world in which aesthetic and political forces work in harmony is a model that is readily available in American history: the American lawyer as Ciceronian statesman of culture. However contrived that role may seem today, it has a strong historical basis in early republican America, which had, or fancied it had, a kind of organic culture in which law and literature were so united that we could regard leading statesmen as special figures we might call political artists. As described by Robert Ferguson,²³ the early American Republic provides an example of a sort of original unity that answers the question of the law-literature relation in a temptingly simple way.

It is, to butcher Shelley, that legislators are the acknowledged poets of mankind, or that they can be so at a certain very specific moment in the early history of a culture. As Ferguson notes, in the early republic it would have been foolish even to ask what the relation of law and literature was, and it would not have been novel to raise the idea of treating legal authority as literary text. Lawyers were ministers and maestros of culture as well as of politics. Ferguson describes a society simultaneously trying to create itself as a culture and as a republic. And recognizing that no republic would survive without the backing of a culture, its leaders pursued the two tasks simultaneously themselves.²⁴

In this myth of origin, the legal rules and principles the republic had to lay down were so broad and fundamental that they bore a connection to wider cultural values. Thus, imaginative and academic talent, because of political urgency, had to be directed toward practical ends, and neoclassical poetic genres were wholly susceptible to political themes on civic virtue. All neoclassical lawyers had literary impulses (though most took the lesson well that the literary was to be professionally subordinated to the practical and legal). Hence, a kind of legal aesthetic could unify early republican political writing. Lawyers were the cultural elite, partly because the ideological rhetoric of revolution had been so legalistic. The rights that the revolution protected derived from right reason and natural law, but operated through the positive laws of statutes and royal charters.²⁵

The poet and lawmaker combined in the role of the new secular priest,

23. R. Ferguson, *Law and Letters in American Culture* (1984).

24. *Id.* at 11-33.

25. *Id.* at 15-16.

and construers of the grand order like Kent paid their homage to Blackstone by both aesthetic and political emulation: They learned from Blackstone a means of ordering the rough social reality of early America. For them, lawyers were the *ex officio* natural guardians of the law, and intellectuals assumed a link between natural law and civic happiness, between nature, order, and positive law. Chief Justice Marshall's courtroom became the studio for creating the symbolic forms of the republic, the theater of public values.²⁶

Law and literature were linked because the professional man's broad cultural responsibilities and his literary impulses were the same. Joel Barlow's goal in *The Columbiad* was "to inculcate the love of rational liberty . . . to show that on the basis of the republican principle all good morals, as well as good government and hopes of permanent peace, must be founded."²⁷ Literature was to facilitate the "great experiment of republican influences upon the security, the domestic happiness of man, his elevation of character, his love of country."²⁸ In a new country trying to explain itself to itself, law provided the necessary imagery of control. Law dealt in a prudence of means that reached toward ideal totalities. "Literary" language was advocacy, exhortation, methodological caution, abstract argument. Justice Story sought to apply "the universal empire of juridical reason" to realize "the splendid visions of Cicero, dreaming over the majestic fragments of his perfect republic."²⁹ The goal was a fusion of beauty and utility, not mere ornamentation to add classical quotation to oral argument. Kent and Story saw their treatises as literature,³⁰ and lawyers

26. *Id.* at 23. The suggestion that law solved a problem of religious division suggests that law became, in effect, the new unifying religion. Hence, if we assume that law did indeed have great culturally unifying power, it might seem more useful to imagine law as a religious than as a literary force, as Thomas Grey does in his essay on the *scriptural* role of the Constitution in American culture. Grey, *The Constitution as Scripture*, 37 *Stan. L. Rev.* 1 (1984). But of course the scriptural model may be a bit too metaphorical in a republic where political and religious authority were to be visibly separate. Thus, the literary model of cultural unity may prove more supple and functional here.

27. J. Barlow, *The Columbiad* (1807), *cited in* R. Ferguson, *supra* note 23, at 25-26.

28. Ferguson, *supra* note 23, at 25-26.

29. Miscellaneous Writings of Joseph Story 215, 786, 781, 795 (W. Wetmore ed. 1852), *cited in* R. Ferguson, *supra* note 23, at 65.

30. *Id.* at 28-33. They sought after classical unities in law as they had in literature: the harmony of nature, efficacy of reason, and hierarchy and decorum. And the lawyers' literature of the time employed the standard neoclassical-public forms of epic verse, light satire, moral and political essay, epistle, and oration. The key model for lawyers and men of letters was, of course, Cicero. Cicero's *De Legibus* begins with the immortality of poetry. Lawyers were to read Virgil and Cicero before Coke and Littleton. Botein, *Cicero As Role Model for Early American Lawyers: A Case Study in Classical "Influence"*, 73 *Classical J.* 313 (1978). Botein treats this nicely as an issue of the sociology of knowledge. Early American lawyers (along with other professions) were eager to act out untraditional political roles without the legitimation of landed wealth or breeding. Hence the Ciceronian model—the orator, not the philosopher. Botein sees it as essentially classical role-playing—as may be true of the law-literature connection generally.

As Ferguson depicts it, Daniel Webster personified the poet, orator, and lawyer as one. Webster favored Pope among poets because Pope saw the great chain that holds together the moral, intellectual, and physical world. For Webster, the temple of justice literally and figuratively ordered society, and circumscribed experience with abstraction. R. Ferguson, *supra* note 23, at 222-25, 233-35. Simi-

were natural authors in an era when literature was directed wholly at establishing America's collective identity.

As Ferguson notes, this unity ultimately broke down, as these forces split in opposite directions. We know that American law became more technical and specialized. We know that market capitalism developed greater sophistication as the solvent of economic development. At the same time, according to standard literary history, we observe a shift in literature from the public values of neoclassicism to the private values of Romanticism. If we follow Max Weber, we must be "causal agnostics" about the relationship among these forces.³¹ But the point here is that in one sense the fusion of legal and aesthetic energy and power seems more feasible in a neoclassical culture, perhaps because the writer's political power is less visible as political power when writers are expected to be public figures. It is harder for poets to be the lawmakers of their culture when law is "more legalistic." On the other hand, law will be more visibly "legalistic" in an individualist culture where public values may be more contested.

Whatever the cause, by mid-century, classical pretenses disappeared under more pressing issues and broader democracy. Politics became more Jacksonian, and classical knowledge became peripheral to legal practice, and the educational and cultural standards of the bar declined. The grand style of the generalist ended with the Civil War. Langdellism was the final death of old classicism, since it purported to make law a separate science. At the same time, Holmes in his blunt positivism decried efforts to see grand natural unities in law, trying instead to redescribe all aspects of law with microscopic particularity.³²

To be sure, the old model of the lawyer as cultural statesman may have survived in a rather mugwumpish way. But if the lawyer represented cultural values, it was no longer as the creator of the organic society but rather as the elitist museum-keeper of cultural value, where what defines the elitist role is its superiority to the democratic mass rather than its ability to represent and define and inspire the values of the mass. In this new model, the lawyer as cultural statesman must become too self-conscious and stylized in his function, and thus less effective. He cannot create and govern culture, so he must become, in a strained version of the Arnold-Trilling tradition, the arbiter of Culture.

By the time this model of cultural statesman became articulated in the

larly, William Cullen Bryant personified the classical model, regarding poetry's dominion over passion as the incitement to civic virtue. *Id.* at 179-84.

31. Formal legal rationality may have had intrinsic causes, and may have in turn helped generate capitalist market rationality. A. Kronman, Max Weber, 118-25 (1983). Or the converse may have been the primary pattern. R. Ferguson, *supra* note 23, at 273-304.

32. *Id.* at 287-88. Ferguson notes that the classical unity of law and letters lasted much longer in the South, with its agrarian tradition and anachronistic mythology. It also survived in the natural morality and vicious anti-modernism and anti-legalism of James Fenimore Cooper, whom Ferguson depicts as a Christian conservative in the Eliot tradition. *Id.* at 297-304.

mid-Nineteenth Century, or perhaps by mere virtue of the fact that it had to be articulated at all, the model reflected a defensive or retreating function for this figure. In the world Ferguson describes, the lawyer-poet comes close to playing quite literally the role of adjudicator or legislator of culture. In the modern Trilling model of the intellectual or artist, the notion of "arbiter" or "administrator" of culture is a somewhat defensive, special-pleading metaphor. Some of the nervously ambivalent apologies for liberalism in American legal scholarship seem to derive from this model, particularly those purporting to draw on the Humanities as a secular source of common value in a democracy or depicting the judge as a sort of moral artist in her role of both giving meaning to and finding meaning in public values.³³

In any event, Ferguson's rich description of the world of the early republican political artist induces skepticism about the law-literature connection in modern culture, at least in secular democracies. In modern democracies, as compared to the early republic, statesmen have lost their inherent moral authority, and it seems anachronistic to conceive of serious artists as possessing political authority. Therefore, a fully realized picture of a culture where legal and literary power and form overlap is either historically irrelevant to us, or, were it reproducible in this century, would represent a concession to a unified form of cultural and political authority which modern democratic assumptions would find dangerous.

I.E. THE TOTEMIC LAWYER-POET

Thus, to the extent that the law-literature scholarship points us toward a Ciceronian unity of ethics, politics, and aesthetics, it points us toward a world that we cannot have or should not want. The writers who insist on the feasibility of this Ciceronian unity may be trying to capture the benefits without paying the costs—that is, the costs of recognizing either that this true unity of law and literature is politically impossible or that notions of an organic society may be politically unthinkable. But to stress the point, we should first note that there is another and more modern—or modernist—version of the unity of the ethical, the political, and the aesthetic, a version very threatening to liberal values. Obviously, the old Ciceronian version has repressive elements of control, conservation, and maintenance. But turn-of-the-century literary modernism reveals another, and more compellingly conservative—indeed reactionary—version of a unified culture, in the form of an artistic dream writ like a reactionary political program. It is a much more primal version, because it goes beyond the comfortable republican notion of the civic man of letters, to a

33. See Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 Stan. L. Rev. 213, 239-49 (1983) (discussing the "New Legal Process" school at Yale).

fundamental unity of cultural control in which myth and ritual unify regulatory law and cultural expression.

This "totemic" version of the original unity of law and literature is the mystical classicist version of an organic culture. It is helpfully exemplified in the writings of T.S. Eliot, and associated with the role of myth in poetry, since myth can partake of both law and literature. Oddly enough, the best sources are some of Eliot's fascist-organic works like *After Strange Gods*, *Notes Toward a Definition of Culture*, and *The Idea of a Christian Society*, works in which the Reverend Eliot also becomes the legislator Eliot, the programmer of a proper moral culture. Eliot's cultural essays, relying heavily on anthropological writing about totemism, sketch out a sort of myth of the primal or ideal society unified in its social-moral-aesthetic fabric. Eliot longs for a world where human actions have moral valence which they now lack in a secular society.³⁴

What anthropologists identify as mana, the spiritual factor that creates social bonding and moral imperatives, requires a very specific social charter, and the totemic mind thinks in moral and legislative categories.³⁵ This is far more fundamental than the Arnoldian search for belief, which Eliot would regard as a sentimental effort to restore the republican notion in a romantic, secular world. In Eliot's ideal world, people live *unconsciously* by moral rules: they may be conscious of the rules, but only conscious of them as categorical rules, without engaging in critical, secular reflection on their bases. Eliot's primal organic society unconsciously worships its own solidarity like a Durkheimian society. Its leader would be someone like Buber's Moses, not a religious revealer but a legislator, a community regulator, a political artist.³⁶ It is as if Eliot wanted to heal the rupture in Western culture wrought by the human chauvinism of science and romanticism by going back in his cultural dream to a state that antedates them. Eliot avoids the explicit expressive ideological role of the Republican political artists by borrowing from the impersonal aesthetics of late Romanticism, with its focus on the artifact as autonomous object. The result is a very subtle ethical aesthetics, a writing of fascistic laws of order into pri-

34. T.S. Eliot, *After Strange Gods* (1934); *The Idea of a Christian Society* (1940); *Notes Toward a Definition of Culture* (1948). See generally Robert Weisberg, *T.S. Eliot: The Totemic-Mosaic Dream*, Bull. Midwest Modern Language Ass'n, Spring 1975, at 24.

35. C. Lévi-Strauss, *Totemism* 15 (1963); S. Freud, *Totem & Taboo* (1919); Moses and Monotheism (1939); L. Lévy-Bruhl, *How Natives Think* (1923). The real source of this view for Eliot is the early twentieth-century anthropology of totemism. In the theory of the totem, the primal society is a clan identified with an animal symbol, which provides as the ruling aesthetic a set of images for distinguishing between the sacred and the profane in the world. The phenomenon of the collective group is the supra-personal force worshiped and obeyed. Obedience to religion is not a matter of real worship or individual salvation, which are signs of breakdown of moral unity. Rather, categories of society simultaneously create categories of thought. The world is an organic artifact, but its aesthetic form is not the source of social hierarchy—rather, the reverse is true.

36. T.S. Eliot, *After Strange Gods* (1934); M. Buber, *Moses* 186 (1946); see V. Buckley, *Poetry and Morality* 132 (1968).

mal sensuousness. It makes law preconscious. It is a dream of a brain-washed world, one for which orderly conduct is unconscious.

This might seem to be a culture based on dogma, but Eliot's notion of the moral/aesthetic program is much purer than dogma. Eliot likes the idea of law, but the ideal law is a preconscious, predogmatic predisposition to think legally, a structure of attitude. Emotion does not create ritual; ritual is learned programmatically, and creates emotion. Myth's power is not fundamentally aesthetic, but ethical. Myth may seem to symbolize in the aesthetic sense, but fundamentally it ritualizes the practical. This may have turned out to be questionable anthropology, relying on a distorted view of primal societies; but it is a wonderfully useful datum of the modernist mind in its grasp of the inherent relationship of ethics, politics, and aesthetics, and the modernist-fascist dream of the unity of culture. It is, above all, a world of orthodoxy.³⁷

Eliot's is a wonderfully perverse dream of a world in which law and literature are united, in which judgment of precedent haunts all present action. So Eliot's primal social structure is a perpetual moral contract, and in the ideal world literature embodies the contract. Eliot does not want belief or myth. He does not want a society where law and letters enjoy a rich and interesting relationship. Eliot hates the modern-romantic idea that poetry does not give the reader a chart of rules, but merely a measuring guide for significance.³⁸ Rather he wants law, and a world where the letter is the law. Art is a vision of a legislated world. Ironically, Eliot respects the devaluers of art, like Trotsky, and fears the worshipers, like Arnold.

I.F. COMMUNITY OR CHAOS

The republican and totemic worlds I have sketched represent either lost or undesirable images of cultures where legal and aesthetic power are united. Some of the law-and-literature scholars, most notably James B. White, nevertheless embrace an image of a world of unified or coordinated legal and literary activities. But this image is a strategically canny accommodation of the practical or moral impossibility of these older, perfect unities. White's, of course, is a liberal vision of society at odds with the totemic world I have sketched. Moreover, his notion of the unity among legal and literary energies in our culture is obviously much subtler than a mere revival of the old republican vision. White recognizes that we live in a world where aesthetic and political forces and visions exist in tension, so he would not in any simple or explicit way affirm an Arnoldian notion of poets legislating for mankind.

White believes that society is held together, indeed made a "commu-

37. T.S. Eliot, *Selected Essays* 346; *After Strange Gods* 50 (1934).

38. Robert Weisberg, *supra* note 34, at 42-43.

nity," by cultural sinews that partake of both the legal and the aesthetic. At the least, then, he argues that in subtle ways we can perform "cultural criticism" by noticing the coordination and parallelism of apparently disparate disciplines and forms of discourse.³⁹ More specifically, he would argue that we can helpfully appreciate how various forms of intellectual and political authority operate in a culture by viewing these forms as, at some level, imaginative or aesthetic creations. On the whole, the inference White draws from this insight is a happy one. First, he perceives nothing so sinister as a conspiracy of powers, as in the totemic version. On the other hand, he does draw the discomfiting inference that when we recognize the hand of human artistry in supposedly objective disciplines and authorities, we must recognize their fragility, their contingency.

But for White, and for what I have called "mainstream legal aesthetics," this unifying contingency in intellectual and political forms is ultimately not very discomfiting at all. It allows for, and indeed causes, an even greater sense of community in a culture, because people doing very disparate things, working in different fields, exerting different kinds of force, can recognize that they are all doing the same thing: They are artistically composing their lives and their culture. In contingency is community. Though taking the aesthetic view of, say, social science and law may demonstrate that these disciplines are less well-grounded than they appear or claim to be, for White their fragility is something that they share, and it is also a shared opportunity for creativity. White gently reworks the Nietzschean idea that when life begins to look intolerable, we can tolerate it if we treat it as an aesthetic phenomenon.

Contrary to White's optimism, this version of the law-literature connection is by no means necessarily so reassuring. The silver lining in the cloud is that we gain community by recognizing our similarity in contingency. The cloud in the cloud is that what we are all sharing is very unsettling. When we begin to denote the aesthetically creative—and created—nature of intellectual disciplines and legal forms, these comfortably grounded and separate phenomena begin to lose their grounding and identity. They all begin to devolve into one another. Objective depictions of reality or systems of value become merely artistic pictures or, to borrow from Roberto Unger, mere "formative contexts."⁴⁰ In a world where we recognize an important artistic component in all intellectual and political authorities, the relatively contained world of separate disciplines with different but not necessarily competing views of reality may become a frightening post-modern dramatic spectacle. Intellectual authority manifests itself into a series of artistic happenings; culture becomes a play of voices where no voice can claim to be foundational. That which is common to

39. White, *Intellectual Integration*, 82 Nw. U.L. Rev. 1, 14 (1987).

40. R. Unger, *Plasticity into Power* 3 (1987)

the disciplines, the human contrivance at their source, causes them to subvert each other.

Of course, this is not *necessarily* a depressing vision. Indeed, for Unger it is liberating. For Unger, the hope for humankind lies in recognizing and enhancing this endless "plasticity" among the formative contexts, this perpetual weakening of all structures, by transcending or breaking their structural assumptions.⁴¹ In the revelation that all political and cultural forms are artifacts lies freedom. Moreover, Unger explicitly depicts it as an aesthetic freedom when he borrows from Keats's notion of "negative capability"—and when he views negative capability as a form of empowerment—an ability to imagine and create what is not.⁴²

Keats defined negative capability as being "in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason. . . . With a great poet the sense of Beauty overcomes every other consideration, or rather obliterates all consideration."⁴³ But only some temperaments can take this vision comfortably. It can be violent—Unger calls it "pitiless recombination"⁴⁴—and jarring to sensibility. To recognize a discipline or system as a context is to smash it. It is nice to be freed of false necessity, and Unger reassures us that this process is not "a leap into anarchy, permanent flux, or mere indefiniteness."⁴⁵ But many have already read Unger's new work as leading to just those things, even if he wishes it did not.⁴⁶

I will conclude this excursus, then, by noting that the assumption of some coordination between aesthetic and legal understanding of reality and forms of cultural authority, the assumption which should define the uniquely interdisciplinary and therefore uniquely fruitful law-and-literature scholarship, can uncover worlds which in either their extreme order or extreme disorder are not so feasible or so attractive as some of the scholarship suggests.

41. R. Unger, *Social Theory: Its Situation and Its Task* 210-14 (1987).

42. *Id.* at 156-57.

43. J. Keats, *Selected Poetry and Letters* 303-05 (R. Fogle ed. 1951) (letter to George and Thomas Keats); see R. Unger, *Social Theory* 156 (1987).

44. R. Unger, *Plasticity Into Power* 208 (1987).

45. R. Unger, *Social Theory* (1987).

46. See Galston, *False Universality: Infinite Personality and Finite Existence in Unger's Politics*, 81 Nw. U.L. Rev. 751, 759 (1987). Galston notes that this "preference for the unsettled over the settled" may be something desired only by elites who have a kind of athletic capacity for consciousness, and it may also be something that may be exercised by elites against people who like their formative contexts just fine or at least think them better than the alternative. And even in Unger's more optimistic view, we must experience a violent context-smashing which is, to say the least, something altogether different from White's gentle, communal recognition that we are all meaning-creating. For a demonstration of the "mutual deconstruction" of sociology, theology, economics, and so forth, into a meta-category of social and intellectual aesthetics, see J. Cuddihy, *The Ordeal of Civility* (1974); Robert Weisberg, *Civility and Its Discontents*, *Salmagundi*, Summer 1975, at 114 (review of John Cuddihy's *The Ordeal of Civility*).

II.A. LAW-IN-LITERATURE

The category of law *in* literature comprises works of fiction and drama (rarely lyric poetry) which deal with legal issues as express content. This can include works with trial scenes, or with lawyers as heroines, or with legal issues as general factors in the narrative, or with larger questions of social justice as theme. In part, the category encompasses the sentimental version of the law-literature connection which I mentioned earlier. We can read literature to better understand concrete human elements of law that conventional legal texts obscure, and thus can use literature to educate lawyers—to deabstract and “humanize” them. In part, this category also signifies the converse: Not that the work of literature uniquely educates lawyers, but that because the literature contains legal content, good literary criticism or appreciation of the work requires the critic to have some legal training.

As I will note below, I agree with a recent argument by Judge Richard Posner debunking the significance of this second part of the category, the “legal training” argument for reading law-in-literature.⁴⁷ I want to concentrate on the first part, which I have somewhat caricatured as sentimental. Much of this work assumes that law is naturally, or has become viewed as, mechanistic, abstract, rule-like, and that to appreciate, apply, or reform law, the abstracted professional, rationalist voice must be replaced or at least complemented by something like a more human voice.⁴⁸

Some conservative voices in legal scholarship have tried to suggest that extreme emphasis on the particular and even on the purportedly empathetic in law not only challenges, but destructively undermines the modicum of legalist generality necessary to civilization, or destroys our ability to make defensible moral judgments in cases of conflict.⁴⁹ I would rather assume that this aspect of the law-in-literature project is morally unassailable. Instead, I will argue that this identification through literature of human voices and sensibilities in legal proceedings is not or should not be a matter of any great discovery, and that it does not exploit the intersection of discourses in any very interesting way.

It is obviously desirable that law should be informed by the voice of the concrete, the particular, the empathetic, the passionate. But to make this point about legal discourse hardly should require recurrence to the great works of the Humanities. In effect, this part of the law-in-literature scholarship constitutes a kind of remedial reading. Lawyers or law students are or should be perfectly aware even from conventional case analysis that human pain underlies doctrinal abstraction, that the general rules of com-

47. R. Posner, at 74-75.

48. Getman, *Voices*, 66 Tex. L. Rev. 577 (1988).

49. Yudof, “*Tea at the Palaz of Hoon*”: *The Human Voice in Legal Rules*, 66 Tex. L. Rev. 589 (1988).

mon law doctrine live in tension with and are often undone by the particular stories of the parties to the case.

A good example is the well-known case of *State v. Williams*,⁵⁰ where a Native American Indian couple was charged with involuntary manslaughter for keeping their child from life-saving medical care. Many commentators on this case have argued that the "reasonable person" standard applicable in criminal negligence doctrine should be "particularized" down to the matters of the specific, socially ingrained reactions of Native American Indian parents to government doctors.⁵¹ This is a vital point in understanding the case, but it is a point readily revealed by conventional doctrinal analysis: Indeed it is perhaps the only important issue to discuss about the case in a conventional basic Criminal Law course. To say that we need to read works of imaginative literature to see this point is odd. It should be unnecessary, since normal human minds and sensibilities should realize the point even by reading the bare facts of the case—so long as the bare facts are made available—and in any event, as I have said, relatively conventional rules/standards analysis would make the point anyway.⁵²

Conversely, if the Humanities are necessary to make this point, it should be the Humanities as fully absorbed into the mental background of the American college student who, under the pretense of our B.A. requirement for law school entrance, has absorbed enough literature in her earlier education to "naturally" perceive the interweaving of character, social and psychological forces, and the spiritual and emotional valence in factual narratives. Thus, to suggest that we must read the classics or even modern literature to see these points, at least at the level of generality at which these points are pitched, is to suggest that lawyers or law students are rather doltish. It suggests that students will miss the point when they read the case itself, so that the instructor must try the textual equivalent of a visual aid—a novel or play—to make the point. If this task is necessary, well, then it is necessary, but it tells us little about law and literature.

II.B. REASON/PASSION AND OTHER PAIRINGS

Nevertheless, one sees academic lawyers arguing the importance of bringing great literature to bear on law to make points of about this level of generality. In a recent essay, Paul Gewirtz has argued:

Literature makes its special claims upon us precisely because it

50. 4 Wash. App. 908, 484 P.2d 1167 (1971).

51. Getman, *supra* note 48, at 583-84.

52. For an argument that first-year students need to read *Job*, and for an argument that reading *Job* helps wean students from pure doctrine toward "policy analysis," see J.A. Smith, *Job and the Anguish of the Legal Profession: An Example of the Relationship of Literature, Law and Justice*, 32 Rutgers L. Rev. 661 (1979).

nourishes the kinds of human understanding not achievable through reason alone but often involving intuition and feeling as well.⁵³

This is a striking example of a sentimental view of literature that sets up a reductive distinction between reasoned moral inquiry and literature and then imposes it on law. This view denies the intellectual side of the literary while exaggerating the intellectual side of the law as normally conceived. Thus, Gewirtz has argued that we can and should fruitfully read Aeschylus to discover the mythic origins of the intervention of passion into law in our civilization; to see how Aeschylus gives the Furies a role to play in Apollonian law is to remind us, as we engage in modern law and legal scholarship, that passion inevitably cohabits with reason in law.⁵⁴ I agree with the conclusion entirely, but I do not see how this necessarily over-general view of classical literature here does much beyond establishing over-general notions about law.

The other side of Professor Gewirtz's argument is the descriptive side: that we see in classic literature images or stories of leaders grappling with forms of justice systems, and that this grappling directly parallels what we see in the actual history of law. Thus, the emergence of the legal forum as a high moment in Greek civilization somehow parallels, say, the development of equity jurisprudence in a common law system.⁵⁵ Once again we see the loose "grand theme" reading of literature producing relatively fuzzy grand generalities about law.⁵⁶

Gewirtz acknowledges that the Legal Realists fought to break down the pretense of perfect rationalism in law, but argues that their mission is not yet accomplished. Thus, as if to demonstrate the persistence of the rationalist pretense, he quotes Justice O'Connor's statement that the capital punishment process aspires to make the death judgment a reasoned moral inquiry into the culpability of the defendant and not an emotional response.⁵⁷ Gewirtz concludes that this aspiration is futile or misguided. But observing a criminal trial or briefly scanning a transcript or merely hearing a closing argument establishes that point quite well. Indeed, it is a truism of trial practice that when the defense lawyer cannot prevail on categorical legal issues, she will use jury arguments to tell a sympathetic, usually deterministic story of her client's life and conduct. The real issues in contemporary death cases, unaddressed at this level of generality, are

53. Gewirtz, *Aeschylus' Law*, 101 Harv. L. Rev. 1043, 1050 (1988).

54. *Id.* at 1047.

55. *Id.* at 1048.

56. The problem with the connection at this level of generality is that connections to modern law become mechanistic, as in Gewirtz's notion that a quote from a contemporary Supreme Court case is directly informed by a quote from Aeschylus. See *id.* at 1051 n. 27 (Apollo's sexist argument in *The Eumenides* 659-60 (R. Lattimore trans. 1953) resembles that of the Supreme Court's opinion upholding California's statutory rape law in *Michael M. v. Superior Court*, 450 U.S. 464 (1981)).

57. *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring) cited in Gewirtz, *supra* note 53, at 1049.

subtler: What precisely does the judge tell the jury that may enhance or suppress the emotion? How does the judge enable the jury to suppress or evade emotion, or deny the jury the power of delusion? In the face of these matters, how do the lawyers pick the jurors? How do appellate courts grapple with the aggregate results of all this maneuvering? To invoke Aeschylus merely to make the noncontroversial point that it is quixotic to expect legal actors to avoid all emotion in capital sentencing is to get relatively little output from considerable cultural input.

A somewhat more promising version of this approach is that of James B. White in his essay "Persuasion and Community in *Philoctetes*."⁵⁸ White finds literature useful in breaking down an overly rationalist mentality in law, but the distinction for him is not quite so mechanistic as one between passion and reason. Rather, it is between pure ends-means rationality, as evidenced by Odysseus in Sophocles' play, and the approach to moral or political problems exemplified by Neoptolemus, which White sees as treating the "personhood" of others as categorical, deontological. Thus, the false assumption is that the conditions for pure ends-means rationality ever exist. They do not—because all human action involves grappling with the unpredictable subjectivity of others, which is to say, with the problem of recognizing character and creating community. These, for White, are the conditions in which both ethical and practical thought must take place. And they are necessarily conditions of "radical uncertainty."⁵⁹

White's use of Sophocles seems more developed than Gewirtz's use of Aeschylus because it at least begins to exploit the literary *form* of the drama as telling us something about legal rhetoric. White sees the play as a contest of types of rhetoric, and draws lessons from the apparent victory of Neoptolemus. White's conclusion about the significance of the play for lawyers is nevertheless somewhat suspect. He asks whether law practice can be transformed from mere rhetorical submission to the unquestioned ends of others to a culturally productive, morally integral process of respecting

the autonomy and maturity of persons whose voluntary cooperation, upon equal terms, is always sought; a symbol of the attainment of full personality, for which community is always necessary. . . .⁶⁰

The problem—a fairly general one in White's writing—is that his sweetly romantic view of legal representation seems indifferent, as is true of much of the Arnold-Trilling tradition, to the crudities of social fact and political power. In an excellent review of White, Richard Weisberg has noted how

58. J. White, *Heracles' Bow* 3 (1985).

59. *Id.* at 24.

60. *Id.* at 26.

White's dichotomous reading of *Philoctetes* greatly distorts the outcome, wrongly denigrating both Odysseus's integrity and rhetorical skill, and wrongly ignoring Neoptolemus' inefficiency and indeed dishonesty.⁶¹ Odysseus may seem to "use" Philoctetes, but he does so for the earthly plausible purpose of serving the greater welfare of the Greek nation. He communicates this motive to Neoptolemus wholly honestly, and he has examined the validity of his ends. He then has honestly balanced the moral costs of his means and found them less significant than the ends. White has carried the Trilling tradition of registering complexity to the point of a kind of aesthetic-moral paralysis, denigrating the value of rational analysis of ends, especially where at least a plausible moral argument can be made for sacrificing the need of individual personhood toward some collective end. For White, values always remain in complex flux. Within the confines of human time and space, they may therefore cease to be reliable values.

II.C. TYPES OF SUBJECTIVITY

Another more promising version of this law-in-literature project is a recent essay by Robin West, which approaches the reason/passion distinction with at least some reference to literary form and, by extension, to the literary aspect of legal discourse.⁶² West does not simply decry our disrespect for the passionate voice in legal discourse. Rather, she is concerned with the foundations of character in law and literature, and, like White, with using literature to identify problems of subjectivity which other forms of legal study overlook. West invokes the concept of "literary woman" as an offensively defensive maneuver to fend off the invasion of "microeconomic man" as the dominant human model in contemporary legal scholarship.

It is not a matter of mechanistically distinguishing reason from passion. It is that economic man is peculiarly both able and disabled. He has complete knowledge and appreciation of his own subjective life, yet is categorically ignorant of the subjectivity of others. Literary woman, on the other hand, is often utterly faulty in apprehending her best interests because the nuances of subjectivity and her submission to others distort her rational self-perception, yet she is very often capable of apprehending the subjectivity of others. Literary woman demonstrates that we are constructed by culture but can learn more about ourselves through our encounter with our culture, and that one reason we can understand culture is precisely that we can project ourselves into other selves. Moreover, West asserts, this notion of personality is also more useful than that offered by Critical

61. Richard Weisberg, *Law and Rhetoric*, 85 Mich. L. Rev. 920 (1987).

62. West, *Economic Man and Literary Woman: One Contrast*, 39 Mercer L. Rev. 867 (1988).

Legal Studies, since it goes beyond a model of dual motivation to see human choice on a continuum of motivations.⁶³

West's insight must be taken far enough to help us guard against the sentimental view that literature automatically offers us a more accurate view of human nature than non-literary discourse. Literature, like any discourse, can be an ideological medium reflecting a contingent form of subjectivity. As Regenia Gagnier has written, for example, an "empirical phenomenology" of Victorian subjectivity reveals something far more tailored by social circumstance than some universally authentic human voice: a very specifically situated mixture of self-consciousness, social ambition, and liberal autonomy. In short, invoking literature as a corrective to bad readings of law does not help much if it contributes only a "literary self" as the instrument of passion where the "legal self" is the instrument of reason. Rather, what the good reading of literature can teach lawyers is the variety and contingency of types of "subjectivity" that arise in specific cultures.⁶⁴ E.M. Forster's famous essay on the person in fiction reminds us that the "self" in the novel is a highly crafted and particular kind of self, freed of most of the mundane duties of daily life and able to devote inordinate energy to exploring and resolving complex personal relationships.⁶⁵ Gagnier's work goes further in identifying the particularly bourgeois concept of subjectivity in Victorian literature—the egotist whose life is an agon of social and economic self-advancement and self-inquiry. It also emphasizes the peculiarity of that literary self by contrasting it with different "subjectivities" that present themselves in the writing lying outside the canon: working class autobiographies.⁶⁶ Thus, lawyers do need to be reminded that the stereotyped liberal human figure of law needs to be corrected by reference to literary models, while we must remain skeptical of any great generalization about literary models themselves being free of liberal bias.⁶⁷

II.D. POSNER ON LAW-IN-LITERATURE

In this regard, Posner's recent debate with West about Kafka helps clarify the issues in this phase of the law-in-literature category. It demonstrates, through Posner's peculiar view of literature, how impoverished views of subjectivity in literature are associated with parallel distortions in law. West's article on Kafka has provoked Posner's most skeptical argument against the significance of the law-literature enterprise, but his attack ends up simultaneously telling us more about the limitations of Pos-

63. *Id.* at 871.

64. Gagnier, *Social Atoms: Working Class Autobiography, Subjectivity, and Gender*, 30 *Victorian Studies* 335 (1987).

65. E.M. Forster, *Aspects of the Novel* 55-56 (1927) (treating the species "homo fictus").

66. Gagnier, *supra* note 64, at 339-45.

67. See *infra* notes 126-40 and accompanying text.

ner's view of law and aesthetics than about the potential of the enterprise, except in the ironic sense that he ends up inadvertently illuminating where the potential of this category really lies.

In his new book, Judge Posner argues that this form of law-in-literature is not an intellectually significant part of the enterprise because the specific legal content of works of literature is adventitious.⁶⁸ If the work is important literature, then anything so specific as legal content could not play a very important role in it; if it did, the work could not have universal appeal. Thus, for Posner, two things are true. First, the literary work could probably not teach even lay people, much less lawyers, anything very significant about law, because if it did, its purpose or effect would be too narrow to be truly literary. *Bleak House* has much to teach us about Nineteenth-Century Chancery practice, but as great as the novel is, a person seeking to learn about chancery practice would still be better off consulting an old treatise.⁶⁹ Second, appreciation of the work cannot depend on the legal expertise of the reader, because, obviously, it would then be only the rare legally expert reader who could read the book deeply.⁷⁰

Posner debunks the legal training requirement,⁷¹ and I think he is clearly right: There is nothing very esoteric or technical about most legal details in great literature. If there were, the literature would probably not be of general interest. The legal details that might enhance some illuminating contextual criticism are not much different from the dash of history or sociology that also spices traditional criticism.⁷² However, Posner's rationale for this conclusion creates some terrible implications for his view of culture: Posner first offers what may seem a sensible observation—that law is only part of the greatness of great literature to the extent that it is timeless universal legal material. He then converts that observation into a rigidly binary view of literature, whereby all that is concrete or topical is trivial and dispensable, while the distinguishing feature of great literature is its broad generality and universality.⁷³

Ironically, most of Posner's discussion about the insignificance of law-in-literature consists of a long counter-argument. Posner's first point is that if there were a significant field of research for law-in-literature, it would concern one general theme above all: revenge. Specifically, he believes that the richest thematic overlap between classical literature and law concerns the presence in literature of problems of revenge for wrongs

68. R. Posner, at 71-79.

69. *But cf.* Miller, *Gift, Sale, Payment, Raid: Case Studies in the Negotiation and Classification of Exchange in Medieval Iceland*, 61 *Speculum* 18 (1986) (legal historians must rely on literature when conventional historical records unavailable).

70. R. Posner, at 53, 76-77.

71. *Id.*

72. See Richard Weisberg, *The Failure of the Word* 147-59 (1984) (analyzing Vere's legal errors under 18th century British military law).

73. See *infra* text accompanying notes 100-03.

where the author presents a pre-legal system of private revenge or blood-feuding.⁷⁴ More ironically, and perhaps correctly, Posner complains that the law-literature writers who value and indeed over-value the law-in-literature side of the enterprise tend to ignore this theme altogether, because their conception of law is too technical and modern. Lawyers, he notes, are interested in mature legal systems, not sociobiology.⁷⁵ What is interesting about all this for Posner is that revenge literature—Homeric, Euripidean, Aeschylean, Sophoclean, or Shakespearean—helps us understand why we have legal systems in the first place.

Indeed, Posner's own essay on the revenge theme in early literature belies his point about the irrelevance of specific legal themes to literature. His clever assessment of the revenge ethic includes arguments that it was inefficient because it involved underspecialization of the labor force; that the revenge ethic impeded social cooperation and was so local as to impede nation-building; that vengeance was too frequent and savage and thus begot feuds that exceeded the original aggression; and that it often led to excessive and thus inefficient punishment. This is standard policy/dctrine analysis in an entertaining application.⁷⁶

It is, of course, a somewhat mechanistic reading of Homer, but it is an interesting one not likely to be written by someone who is not a law-and-economics analyst. Perhaps Posner wrote it ironically to show how absurd legal analysis of literature is, but I doubt it. Rather, Posner has done something roughly continuous with what such law-in-literature analysts as Richard Weisberg, Judith Koffler, and Barbara Johnson have done.⁷⁷ He has examined a specific cultural phenomenon that is most manifest in literature, and that is associated with the role of law in a modern society but whose indirect connection with law suggests the wider emanations of issues of justice and regulation. Indeed, Posner is careful to qualify his revenge theme with the proper caveats about intentional or didactic fallacies.⁷⁸

Now that still leaves the question of what this really has to do with law-and-literature, but for the relatively adventitious fact that it is in literature that we have the best records of pre-legal revenge rules. This criticism would not bother Posner very much, because, of course, it is his premise that there is not much of substance in the law-in-literature matter anyway, though it may leave us wondering why he spends so much of his book on a counter-example to his main theme. It may be because it gives him a chance to illustrate a wider theme which is crucial to other argu-

74. R. Posner, at 27-70.

75. *But see* Miller, *supra* note 69.

76. R. Posner, at 28-33.

77. *See* Richard Weisberg, *supra* note 72; Koffler, *Capital In Hell: Dante's Lesson on Usury*, 32 Rutgers L. Rev. 608 (1979); Johnson, *Melville's Fist: The Execution of Billy Budd*, in *The Critical Difference* 79-109 (1980).

78. R. Posner, at 62.

ments he makes in the book. Posner has an absolutely clear social ethic in this book, and the revenge literature lets him play it out on both its levels. It is the ethic of mature practical reason. He makes it clear that his favorite literary type is the *Bildungsroman*, where the romantic or violent personality is purged of illusion, excess, and passion, and achieves pragmatic maturity.⁷⁹

The revenge literature enables him to make this point about both societies and individual heroes. Posner reads the classics as collective *Bildungsromans*, where a society sows its wild oats and adopts an ethic of mature, anti-transcendental practical reason. Later, as he reads controversial works, he shows his tendency to draw rather tendentious conservative conclusions out of literature and thereby deny some of the more subversive effects of reading things either more concretely—with more respect for their concrete legal or political content—or dialectically—with a greater sense that literature is involved in other forms of discourse. Maturity is not just a theme but a maneuver for keeping literature, law, and other potentially unstable and related forms of discourse in safely separate categories. Maturity is the default theme. It is the thing Posner permits literature to be about when he refuses to let it be about something else which he fears would subvert the safe privileged status of literature. In individual case studies, whether of modern fiction⁸⁰ or of classical drama,⁸¹ he

79. *Id.* at 81.

80. Posner treats at length the James Gould Cozzens novel *The Just and the Unjust* (1942). R. Posner, at 79-82. Posner wants to argue that the book, often taken to be one of our best realistic novels about law and lawyers, is not in any interesting way about law or trials at all. Thus, Posner tries to fend off criticism that the book displays Cozzens' "belligerent legalistic conservatism." McWilliams, *Innocent Criminal or Criminal Innocence: The Trial in American Fiction*, in *Law and American Literature: A Collection of Essays* 89 (ABA Committee on Undergraduate Education in Law and the Humanities 1980).

Posner offers a typically begrudging reading of *The Just and the Unjust*, seeing the legal material as essentially a convenient, somewhat random choice for topical material. This says more about Posner's view of literature than it does about Cozzens. Posner's reading of the book glosses over the ugliness by denying that the book is really about law at all. Rather, of course, it is a *Bildungsroman*, the story of the prosecutor's rise to maturity. *Id.* at 81. But Cozzens' realist aesthetic is quite straightforward. This novel really is about law, in a dense, specific way. It may also be about a conservative, toughly pragmatic view of institutional compromise. It has a firm factual basis in this one specific social institution, and its didactic pronouncements about the law have to be taken quite literally if one is to accept Cozzens' aesthetic on its own terms. It is a detached, coldly intellectual book. It is about the human desire for certainty, but law is not just the adventitious medium for seeking certainty; it is the specific way society seeks it. Law is not a metaphor for human discipline; it is the very form human discipline takes.

Moreover, if the hero, Abner Coates, achieves some sort of social and personal maturity in the book, it is not a general maturity for which the profession of lawyer is merely an occasion or medium. Rather, it is central to Cozzens' view of human fallibility that the more gifted in society are empowered and duty-bound to exert control over the even more fallible in the world, and that they are to do so precisely by engaging in a professional vocation. Posner's overly general notion of a literary theme cannot easily accommodate realism in this earthy and direct form. Posner seems to fear recognizing the concrete legal content of any novel. In purporting to be more sophisticated about aesthetics than didactic and reductionist readers of literature, he shows an intolerance for the varieties of aesthetic postures.

81. We see another version of the denial maneuver when Posner examines one other broad literary theme which he associates with the theme of revenge: equity. Posner does a perfectly respectable

impressively demonstrates the maturity theme, but overall it is a questionable critical principle.

Posner's missing dimension is the cultural, the historical, the anthropological. He fails to see legal documents as not wholly discontinuous from literature, as sets of cultural and symbolic data. He therefore greatly devalues the specific gravity of the legal content of a work of literature. Thus, he not only derogates the significance of legal content in works of literature, but he derogates the law-in-literature analysts for making too much of this content. Sometimes, his targets are fairly easy; but though he may hit them forcefully, he also thereby reveals the limitations of his own view of literature.

II.E. THE KAFKA ISSUE

By far the best example of Posner's denial maneuver is his reading of Kafka. It is with Kafka that Posner is most anxious to reduce the specific things that a work of literature is allowed to be about, where he seems most skeptical of the wider significance of specific social content in literature. Clearly, the standard revenge, maturity, and equity themes are not available for Kafka to be "about." Posner cannot refute the bleakly negative nature of Kafka's world. But he manages to tame the negative by denying that it has anything to do with the intermediating force of society. It is more local than that, being about the interior life of solitary souls, and it is simultaneously more general than that, being a universal condition of humankind.

Thus, for Posner, "The Penal Colony" is not about law.⁸² It cannot be about law because its image of law is too unrealistically bizarre. Therefore, "The Penal Colony" is about a more generalized thing called failure, "the ordinary human inability to get others to share our plans and our passions."⁸³ Nor is *The Trial* interestingly about law, since again the legal proceeding is too absurd to have any referential quality. It is about

futile efforts to find a meaning in a universe (symbolized by the

job in showing that *The Merchant of Venice* is not in any interesting educative way about law. R. Posner, at 91-101. But he concludes somewhat gratuitously that what it is really about is Portia's equity jurisprudence as a demonstration of the maturity of law, whereas Shylock's hypertechnicality, while it actually makes for more dazzling plot theatrics, is associated with immaturity and revenge. Even more specifically, Portia's equitable maturity is a means of cheating Antonio of his masochistic desire for transcendental martyrdom.

Equitable jurisprudence thus becomes the other main law-in-literature theme in which Posner shows an interest, because it enables him to subsume the hypertechnicality of formalism within the revenge ethic which he thinks a mature society transcends. The same is true of *Measure for Measure*—yet another work about the superiority of the practical virtues to angelic aspiration through understanding law maturely as a continuum between legalism and equity. *Id.* at 101-10. Similarly he reinterprets *Antigone* as a conflict between hypertechnical rules and equitable standards. *Id.* at 111-12.

82. F. Kafka, *The Penal Colony*, in *The Complete Stories* (1971).

83. R. Posner, at 118.

court) that, not having been created to be accommodating or intelligible to man, is arbitrary, impersonal, cruel, deceiving, and elusive. . . .⁸⁴

Thus, Posner is willing to draw pessimistic conclusions from literature, but only in denatured, generalized ways. In that sense, he is not so different from James B. White, whom he otherwise so persuasively criticizes. Posner is willing to make Kafka psychologically referential—but never politically referential.⁸⁵ For Posner, *The Trial* is insufficiently factual about totalitarianism to be about totalitarianism. And if it were—as he says of the work of Arthur Koestler—then it would be mere journalism.⁸⁶ Joseph K. is too apolitical for this to be a political book, and the court has no express political mission.

Posner's views on Kafka are his most fully developed because of his published debate with West. West's initial article on Posner and Kafka,⁸⁷ like Barbara Johnson's on Melville, can be seen very generally as a version of the general project laid out in Richard Weisberg's work: to establish some cultural phenomenon called legalism which is most manifest in literature, and which a legal perspective can help illuminate. West sees Kafka as depicting what we can call a "literary" figure of the human character in a way that usefully refutes, by living in tension with, the "legal" figure, of which the economic figure is the most exaggerated version.

Here is West's essential thesis: Kafka's characters typically consent to market transactions, employers' imperatives, and legal and familial authority, and thereby get exactly what they *think* they want.⁸⁸ Kafka thus poses ironically what Posnerians pose seriously—consent as a moral trump to claims of injustice. Where Posner's law-and-economics work presents a Panglossian world of characters satisfied by all they have consented to, Kafka presents a truer, uglier version. Kafka's characters may appear to consent to the events of their lives, but they do so out of a craving for miracle, mystery, and authority in deals that are only superficially consensual. Joseph K., the Hunger Artist, the failed entrepreneur of "The Judgment," and all the others "consent" to humiliating sexual, commercial, and employment situations, and "voluntarily" assume the risk of loss. The Hunger Artist is obsessed by—and then destroyed by—his need to be autonomous. West argues that Kafka's characters always hypothesize a welfare-maximizing excuse for giving in.⁸⁹

84. *Id.* at 125.

85. "[*The Trial*] is to neurosis what *Macbeth* is to ambition." *Id.*

86. *Id.* at 126-27.

87. West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 Harv. L. Rev. 384 (1985).

88. *Id.*

89. *Id.* at 410-11.

In Kafka's ugly version of Posner's world, there is no social rescue of the losers, the ones who suffer the bad risks of apparently rational *ex ante* transactions. For West, much social and economic consent is an illusion, exercised as a hapless effort at self-legitimation that ends in self-destruction. And what appears to be adherence to the legal rules of fair transactions is in fact the human weakness for authority—not the exercise of choice but the evasion of choice. Clearly, this is a bold reading of Kafka and does not fully respect economic distinctions between *ex ante* and *ex post* perspectives or conventional contract limitations of duress, incapacity, and so on. Yet also clearly, West captures something very essential to Kafka's vision of how people conduct themselves in bourgeois society.

Yet Posner rejects this reading categorically. He says flatly that the reading is wrong because it treats Kafka as a realist, and, for Posner, Kafka is not a realist. All the legal and political details are, once again, "adventitious." Kafka deals with perennial human problems and the interiority of souls. Just as the officer in "The Penal Colony" is a generalized type of human figure who suffers isolation because, like so many of us, he cannot get others to share his plans or passions, so *The Trial* is not about law or politics, and the book cannot have any political message because K. is not even identified as a subversive. As Posner says of the hero of *Metamorphosis*, Kafka depicts the universal:

We all have Gregor's problem. . . . We can never make our aspirations fully understood or quite bring our self-conception into phase with the conception that others have of us.⁹⁰

Similarly, "The Judgment" cannot at all be about capitalist alienation, so it must be about guilt in the abstract, life's general unfairness, the indifference of others to our inner turmoil.⁹¹ I said before that maturity is the default theme of literature for Posner, the theme that he allows for books when he argues that they have no more specific themes. But with Kafka, where the maturity theme is inapposite, the secondary default theme is private misery and grief.

Posner's error is to confound such different matters as realism, naturalism, topicality, referentiality, and reductionism. He says West's reading of Kafka reduces Kafka to a topical writer, and that West wrongly views Kafka as a realist. Now, Kafka is certainly not a naturalist in the sense of Zola. But he can plausibly be described as a realist—of a special, spectral sort.⁹² His writing certainly "refers" to economic and social matters as the indispensable context of the lives of his characters, but this does not mean that his books are therefore topical and not universal: Posner's binary op-

90. R. Posner, at 183.

91. *Id.* at 185.

92. G. Lukacs, *Realism in Our Time* 48 (1929).

positions just confuse things. Posner's remark that there are no applications to law in Kafka is bizarre, given Kafka's perfectly obvious treatment of social and economic choice, the fundamental base of modern private law doctrine.

This is not to "reduce" Kafka at all, or to make him any less "universal" than he would be under Posner's reading. It is to make the universal or general point that apparently free choices are partly constrained and determined by social and economic contexts, and have their consequences within those contexts. Posner "reduces" literature to a privileged position where it has no consequence except at the most abstract level of universality or the most disengaged level of psychological inwardness. Truly, it is Posner who engages in reductionism. Where he finds an inarguable case of determined "choice" in Kafka, he says that Kafka is writing perfectly consistently with standard legal doctrines of duress, coercion, or incompetence defenses, thus denying that the writing has to do with general themes of human psychology at all.⁹³

Posner's misreading of Kafka underscores the lessons that can be learned for law from good readings of literature. As I mentioned earlier, Regenia Gagnier's discussion of "bourgeois subjectivity" in Victorian literature demonstrates the political contingency of the image of self in mainstream literature: the middle-class literary subject that assumes creativity, autonomy, and capacity to create value by acting out its projects on the world.⁹⁴ On the other hand, in her studies of working class writing, Gagnier demonstrates the other, less reflective and autonomous types of subjectivity in Victorian literature. More strikingly, she shows how some working class writers strain to treat their life stories under the literary principles of the middle-class self; but where their experience is too inapt for the aesthetics of bourgeois selfhood, the result is both aesthetic distortion and psychological disintegration.⁹⁵

Posner, then, misunderstands literary realism. Kafka's fiction is very much about interior despair, but is also about the social world that helps create it. Parasitism, dependency, the uselessness of those who live alienated from real labor, all become dispensable commodities themselves like Gregor. He also writes in a specific personal world where the human disasters of the industrial age are quite concrete.⁹⁶ Indeed, what makes Joseph K.'s case most poignant is that he wants to conform and succeed as

93. R. Posner, at 191.

94. Gagnier, *supra* note 64, at 351.

95. *Id.* at 357-59.

96. Kafka wrote in a wonderful 1909 letter about his Worker's Compensation job of the daily reality of people falling from scaffolding into machines, beams tipping over, slag heaps loosening, and so on. F. Kafka, *Briefe 1902-1924* (1958), *quoted in and translated by* Reimann, *Kafka and the Present*, in *Franz Kafka: An Anthology of Marxist Criticism* 53, 55 (K. Hughes ed. 1981) [hereinafter K. Hughes].

a perfect bourgeois man—indeed, that is the source of his compliance and frustration.

Kafka's prose is full of petty realistic detail, but of so spare and selective a sort as to deny the presence of a conventional realistic background. Much of the detail is mere random particularity: It has no evocative significance because he finds himself in a world negating significance.⁹⁷ The ugly authority figures that people the stories are present arbitrarily and capriciously, and yet in their corruption and pedantry are right out of Central Casting for Prague society. So it is not absurd to argue that Kafka is really writing about the quiet terrors specifically generated by imperialist capitalism, or at least to argue that we cannot appreciate the universal terrors he describes without locating them in the cracks of imperialist capitalism—and law. It is the normal street life of the bourgeoisie, not dark, inner lonely moods, which is so frightening. Thus, Kafka's distinct aesthetic involves a subtle unity of levels of existence, a continuity of the social, individual, and religious.⁹⁸ If you destroy the unity, you destroy the work.

What is thus most striking in Posner's dismissal of law-in-literature is the way he has to read literature to make his point. His is a Darwinian consensus theory of literary greatness. Great literature is universal and general and survives on general themes, and law is one of them—at a high level of generality.⁹⁹ Hence, it is not surprising but neither is it interesting that law figures in literature: It will be law's most general aspects, "not the fine mesh of historically specific and concrete legal details that is lawyer's law."¹⁰⁰ For Posner, nothing intermediates between the general and the specific.

Posner's is a strictly non-dialectical way of reading, and it is not very sensitive to the way literature works. Much terrible literature is terrible because it is so abstractly general, and most great literature is greatly concrete.¹⁰¹ Posner's is thus the contractual, consumptive, abstracting view of

97. G. Lukacs, *supra* note 92, at 52-53. Kafka describes the actors and structures of the law in some detail, but his characters and readers experience the law nevertheless as an abstraction, a mystified representation of politics in the form of law. We never know whose power it expresses and what order it defends. Suchkov, *Franz Kafka*, in K. Hughes, *supra* note 96, at 125.

98. Winkler, *The Novels*, in R. Gray, *Kafka: A Collection of Critical Essays* 45 (1962).

99. Posner acknowledges that one cannot define literature, that there is no objective definition that determines whether it includes, for example, Lincoln's speeches or Gibbon. But: "The more local or topical in its essential meaning a text is, the less likely it is to be able to float free from its original context; the less likely it is, therefore, to function as literature." R. Posner, at 76.

100. *Id.*

101. Terry Eagleton supplies a perspective on this. Eagleton is very suspicious of what he considers to be two ironically allied schools of criticism: the old-fashioned school of appreciation, and the debased materialist school of relevance. One directly expresses ideology, the other reproduces it in apparent value-freedom. Eagleton sees them both focusing on questions of extractable value and ignoring or alienating the historically specific. In short, both are rampantly ideological. Criticism becomes a "mutually supportive dialog" between two self-congratulatory subjects—text and reader, a relationship sealed by ignoring the historical density on both sides. The result is Literature with an upper-case "L", the privileged canon. T. Eagleton, *Criticism and Ideology* 164 (1976).

literature. It ignores the very fact that we can at least benefit from a materialist explanation, as much as a universalist one, of why literature survives. If literature is to be studied as cultural discourse, it has to be locally situated. As Posner always argues in criticizing others' political readings of literature, it is bad to be a reductionist. But apparent anti-reductionism is a subtle form of reductionism: it isolates the play of signification from all its local sources.

What we get from Posner are two separate poles—moralism and aestheticism. Posner is in effect guilty of both—the autonomy of both value and form. A work is truly aesthetic because it is irreducible to its historical and ideological source, but it cannot be appreciated separately from that source either. In a binary approach like Posner's, the aesthetic is a way of distancing, denying, or transforming the author's historical, social, and political situation. The relation between the aesthetic and historical is not one of levels in a hierarchy. Rather, it is that historical conditions determine in part the aesthetic.¹⁰²

The survival of works of art has something to do with the aesthetic richness of concrete ideological junctures, conjoined also with formal literary genres. And survivability is itself ideological. Great works do not survive their origins—they have interesting concrete relations with them, relations which are themselves partly historically determined. Dante belongs to all history by virtue of the way he occupies a particular moment in history. To use Terry Eagleton's fine phrase, Dante wrote on a fault-line of culture.¹⁰³ Kafka also writes on a very particular historical fault-line: The Austro-Hungarian world is a dying empire suffering conflict between an old feudal age and new bourgeois pathologies. And there are "fault-lines" of literary form as well. The great writers work by upsetting the conventional forms when those forms get culturally unsettled.

II.F. THE LAWYER AS MODERNIST SENSIBILITY

To return to law-in-literature, Posner fails to appreciate not only the complexity of literary subjectivity as it might illuminate law, but also the way literature can depict moral and aesthetic apprehensions of political reality in a way that intertwines literary and legal evaluations of human

102. T. Eagleton, *Criticism and Ideology* 169-78 (1976). I invoke this sort of deconstructive Marxism, best exemplified by Terry Eagleton, with some caution. As Howard Felperin has argued, Eagleton's approach is, ironically, vulnerable to its own risk of essentialism, of assuming that its materialist view of history is privileged and grounded in a way that he otherwise denies literature or discourse can be. H. Felperin, *Beyond Deconstruction* 55-63 (1985). Nevertheless, I find it a useful and cautionary corrective to an approach, like Posner's, which so categorically denies the relevance of any specific historical gravity in literature. As Eagleton argues in his discussion of Trotsky's generous views of Dante, it is not that Dante speaks of or expresses a historical era. Rather, his aesthetic value lies in the process by which he writes at a certain ideological juncture. It is tautological to say that Dante is aesthetically valuable because he transcends his historical moment. T. Eagleton, *supra*, at 181.

103. T. Eagleton, *supra* note 102, at 181.

conduct. In this regard, the most ambitious effort is that of Richard Weisberg, whose goal has been to identify a cultural phenomenon we might loosely call “wordy legalism” in modern history.¹⁰⁴ “Wordy legalism” is a state of mind by which human beings repress natural forces of love, power, and community through verbose rationalization or narrative distortion. It is not a phenomenon limited to law, but legal thinking is the paradigm of the kind of intellectual evisceration that language can carry out on life, and the phenomenon is most manifest in novels in which legal actors play a prominent role.

The Failure of the Word offers an unusually non-self-congratulatory use of the law-in-literature link, one which manages to achieve some of the interdisciplinary subversion of which I spoke earlier. Weisberg’s introductory note on Joseph Haennig, the French lawyer who helped decide who was Jewish and who was not under the Vichy regime, establishes the continuing significance of that intellectual effort.¹⁰⁵ Weisberg’s premise is that *ressentiment* has ruined modern culture by destroying the polymorphous perversity of original love and virtue.¹⁰⁶ I am less interested here in the rigor with which Weisberg has worked out this position than with what his project says more abstractly or generally about the law-literature connection. Weisberg describes the major manifestation of *ressentiment* as verbalizing ratiocination. Now the book is only superficially about law and literature if he simply finds lawyers as examples of verbalizers as convenient models in novels. It becomes deeper only if he finds some connection between literary language and law language as forms of repression.

The lawyer and the modernist writer have in common a self-consciously distortive form of narrative structuring, a “legalistic proclivity,” a general tendency toward the verbal in culture that is interestingly manifest in both law and literature. In this sense, Weisberg’s book recalls Robert Ferguson’s.¹⁰⁷ When Nineteenth-Century law became “modern,” when it became technical and formalistic, it lost its Ciceronian civic generality. Simultaneously, modern literary form became more complex and reflexive, and also became more dubious about the value of narrative. If the law-literature connection concerns the fundamental unity of forms of discourse, and if I am right that that unity can be fearsome, then Weisberg has essentially recognized one dangerous side of the unity: When the power to wield ethics in bourgeois society becomes allied with aesthetic power, it becomes repressive—it is like Eliot’s brainwashing authority. It shows narrative skill filling the ethical gap in a godless world. As Weis-

104. Richard Weisberg, *supra* note 72, at 13-23.

105. *Id.* at 1-3, 181-82.

106. *Id.* at 13-23.

107. R. Ferguson, *supra* note 23.

berg argues, it substitutes wit for judgment, elegance for substance, words for values.¹⁰⁸

I find Richard Weisberg's general approach satisfyingly discomfiting. It certainly has discomfited Judge Posner, and though Posner may be quite accurate in summarizing flaws in Weisberg's argument, his critique once again becomes an interesting inadvertent subtext on the perverse complacency of Posner's own view of law and letters.

Posner attacks what he considers Weisberg's superficial romanticism. Posner connects the criticism to the theme of maturity; he sees romanticism as the childish view of life from which mature people recover. Odysseus' reintegration is the proper consequence and partial refutation of a romantically heroic career. And when Posner gets to Weisberg's shaky rationalization of Camus' Meursault, Posner makes clear that he regards law as a bastion of Apollonian values to which romantics must, if they are mature, surrender.¹⁰⁹ Similarly, Posner argues, contrary to Weisberg's denunciation of Vere in *Billy Budd*,¹¹⁰ that the proper reading of *Billy Budd* is the mature one which recognizes that secular justice cannot be as grandiloquent as higher laws, but is the only kind of justice we can have.¹¹¹ Hence, for Posner, Melville recognized that the affairs of a fallen world could not be regulated by a higher law.¹¹²

Richard Weisberg has at least proceeded beyond the sentimental version of law-in-literature that views literature simply as the voice of passion needed to inform the cold rationalization of law. Weisberg's approach is more creatively interdisciplinary because it perceives a connection between aesthetic self-indulgence in form and autotelic legal rationalization. In modern legal novels, the novelist always embeds in the story an objectively reliable "anterior" reality, so that the clever reader, so far from getting ensnared in the verbose creativity of the lawyer-figure, can trace that figure's distortions of reality.¹¹³ For Weisberg, modern art as well as modern law is impaired by self-indulgence in language and form, a self-indul-

108. Richard Weisberg, *supra* note 72, at 178.

109. R. Posner, at 86-90.

110. This denunciation is weakened by Weisberg's somewhat forced comparison between Vere and Chief Justice Rehnquist's result-orientation. Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U. L. Rev. 1, 42-58 (1982).

111. R. Posner, at 160-65. Posner's new book also addresses Dostoevsky in this regard. For Posner, *The Brothers Karamazov* is a modestly interesting study in the adversarial phase of Continental criminal procedure, but is mostly about the inevitable compromises in secular as opposed to higher law. *Id.* at 166-70.

112. Posner extracts from Melville more wry positivist pragmatism, enhanced by a weird citation to Holmes's *Buck v. Bell* opinion. *Id.* at 164-65, citing *Buck v. Bell*, 272 U.S. 200 (1927) (permitting forced sterilization of mentally incompetent people on grounds that "three generations of imbeciles are enough").

113. Richard Weisberg, *Law in and as Literature: Self-Generated Meaning in the "Procedural Novel"*, in *The Comparative Perspective on Literature* 224 (C. Koelb & S. Nobles eds. 1988).

gence which has dangerous epistemological as well as moral consequences.¹¹⁴

II.G. THE DIALECTICS OF AUTHORITY

Richard Weisberg's work has demonstrated how a legal theme can exert specific gravity in fiction; a recent essay by Barbara Johnson also refutes Posner's notion of the adventitious role of law in literature by showing how law can be *the* trope, not just one convenient trope, for the problem of human judgment. Johnson's treatment of *Billy Budd* demonstrates how the aesthetic, moral, and legal problems in the novella have a common center: the issue of authority. Melville tries to "end" the novella four times, as if stressing how quixotic a firm aesthetic resolution of the narrative is. For Johnson, the aesthetic irresolution is a trope for the moral, political, and legal irresolution. The unifying, if discomfoting, theme of the novella is the fragility of authority in all its related guises.¹¹⁵

Johnson notes that the standard readings of *Billy Budd* fall into two camps: The "acceptance school" is the older, classic reading of the novella as depicting Vere's tragic wisdom in recognizing and lamenting the necessary sacrifice of the individual to the higher and general good contained in the law. The ironic school distrusts Vere's motives or justification. It accuses Vere of misreading the naval law of court martial to construct an argument of necessity.¹¹⁶ Some critics treat Vere's reading of the law as mistakenly at war with his conscience. For example, Richard Weisberg has argued that, in part because of a subconscious projection of his envy of Nelson, Vere sincerely wants to hang Billy, and acts in bad faith to distort the law to justify his impulse. Thus, for Weisberg, Vere is in the line of wordy dissemblers. Weisberg believes there is an anterior reality

114. Weisberg treats novelistic form by seeing in his category of legal novels the unfolding of an anterior narrative, followed by the distortion through the legal mind, and then positing two standard "structural negations": first, the communally condoned institutional evaluation of the "defendant"; second, the subversion of aesthetic balance at the end of the narrative. Weisberg depicts the awkward resolution of the debate between the prolix and the mute in the emergence of the mute protagonist as prolix. But this sudden burst of prolixity is a negative, because it is associated with death, as with Meursault, Alyosha Karamazov, and Billy Budd. *Id.* at 232-34.

Certain limits in Richard Weisberg's book stand out. Though he embraces something much subtler than a passion/reason distinction, his splitting the world into the Adamic and the rational remains too binary. Second, his integration of thematic with formal concerns remains incomplete. Heinzelman & Levinson, *Words and Wordiness: Reflections on Richard Weisberg's The Failure of the Word*, 7 Cardozo L. Rev. 453 (1986). Weisberg's effort to identify a distinct category of the legal novel is a bit artificial, since, as John Ayer points out, his criteria for the lawyer-protagonist remain rather soft. Ayer, *The Very Idea of "Law and Literature"*, 85 Mich. L. Rev. 895 (1987). One looks forward to Weisberg's developing at greater length, and at a more abstract plane, the phenomenology of ratiocination that he describes. He might develop further how this phenomenon links aesthetic and legalistic apprehensions of reality, as well as to his working out more systematically the relationship between his notion of ratiocination and Christianity.

115. Johnson, *supra* note 77.

116. *Id.* at 79-80, 85, 97.

here—Billy's innocence—and that the theme of the novella is the subjective distortion in the guise of neutral judging.¹¹⁷

Johnson's reading shows far less faith, or attributes to Melville far less faith, in any anterior reality, and sees the problem of adjudication as something more fundamental than subjective distortion. Johnson points out, however, the reflexive nature of the book: It is not a matter of simple interpretational ambiguity that the book puts readers to the choice. Rather, the problem of choosing and the problem of accurate readings of reality are embedded into the story. Melville sets up the allocation of virtue among the characters against the legal resolution of the plot, while also setting up different ways of reading reality.¹¹⁸ The key in reading the novella, as Johnson sees it, is not to choose, but to see what is at stake in choosing. The story is about multiplicity of readings of moral reality and multiple approaches to choosing outcomes.¹¹⁹

One judges in the face of ambiguity by converting ambiguity into decidability. The judge converts inner discrepancy into outer discrepancy. Moreover, Johnson demonstrates how the paradigm unites form and content in Melville. In examining Vere's method of judging Billy, we are drawn into the paradigm as we find ourselves judging Vere. In Johnson's account, what unifies aesthetic rendering and judging is that both judge and observer must realize that they alter the thing on which they act.¹²⁰ For Johnson, judging is "cognition functioning as an act." Vere stands amid binary oppositions, but he also creates and projects them.

So the function of judgment is to turn the ambiguous into the decidable—to turn internal conflict into external opposition so the judge can choose and balance. It is Vere who sets Claggart against Billy to resolve things; but rather than resolve this clash between innocence and violence,

117. Richard Weisberg, *supra* note 72, at 131-77.

118. Billy himself represents, in effect, the pure non-reader, for whom appearance and reality are never distinct. Claggart is the opposite, who questions the motivation behind all appearance. Melville, in Johnson's view, favors neither, since both miss the inherent ambiguity of the issues they see. Johnson, *supra* note 77, at 84-85.

The naive believer thus refuses to believe any evidence that subverts the transparency of his beliefs, while the ironic doubter forgets to suspect the reliability of anything confirming his own suspicions. *Id.* at 98.

Meanwhile, Vere himself is not so much the resolution of these two but a master of moral finesse—the one who tries to embed all the opposing means of reading reality and making choices in history and precedent. He seeks to avoid epistemological dilemmas by converting the inner ambiguity of people and events into external choices, the outcomes dictated by convention. He is all context, as if context eliminates the dilemmas.

119. *Id.* at 97-102.

120. Vere must realize that his decision on how to judge Billy must take into account the effect of his own decision—the question of suppressing or further invoking mutiny. Similarly, his shadow in the book, the old Dansker, purports to be a mere observer, but his observation of Claggart's enmity towards Billy, once communicated to Billy, proves the start of a fatal series of events. *Id.* at 84, 107. Captain Vere is supposedly the balance between Billy's naivete and Claggart's irony. Vere is neither pure spirit nor face value, but convention. The anti-Vere people see Vere as lying about history and context. The pro-Vere people take the history as Melville literally gives it. Johnson cites Plato's *Laws* for the facts that poets can accommodate contradiction but legislators cannot. *Id.* at 102.

he merely reverses the poles: Billy's internal division between submissiveness and hostility, Vere's between love and authority. There is thus no clear way of reading ambiguity merely aesthetically without reading it politically. As Johnson argues, the communication of knowledge is no more innocent than the communication of power.¹²¹ Johnson really brings the law-literature question back to Robert Cover's insight. Judging may seem to mirror high aesthetic cognition, but it is cognition that violently eliminates "differences within" into "differences between" to make external judgment possible.

Thus, as Johnson interprets it, *Billy Budd* is much more aesthetically modernist, more self-referential than many recognize. And in this way it says something about law too—establishing a link at the level of perceptual self-referentiality. The book's concern with the "ragged edges" of truth¹²² finds harmony in its ragged form, its frustrated quest for a way to end the plot.¹²³ Johnson's study of Melville thus captures for us the formal as well as the substantive intersection of aesthetics, morality, and law.¹²⁴

III.A. LAW-AS-LITERATURE

The more elusive part of the law-literature enterprise treats law *as* literature. This part has two frequently explored sub-parts. The more limited sub-part concerns legal writing in terms of style and rhetoric. The alleged connection between literature and legal writing (here broadly conceived as advocacy, though it can include judicial opinions as a form of advocacy) lies in the common denominator of classical rhetoric, which is essentially independent of what we consider in modern terms to be literature. Let me qualify that criticism by noting that if we return fully to the classical model of letters, rhetoric and literature are intimately connected. But much of the law-literature enterprise focuses on modern literature, which has little to do generically with formal rhetoric, and whose stylistic capacities would seem to be inapt for legal writing. And to the extent that the classical model is the appropriate one for the enterprise, that, as I have discussed earlier, raises some very troublesome political and moral

121. *Id.* at 108.

122. H. Melville, *Billy Budd*, ch. 29.

123. Johnson, *supra* note 77, at 80.

124. As if to show the fruitfulness of this endeavor, a recent essay by Teresa Phelps, which cites and seems in part informed by Johnson, plays out a similar inquiry into the dual contingency of literary and legal authority in *The Adventures of Huckleberry Finn*. Phelps, *The Story of the Law in Huckleberry Finn*, 39 Mercer L. Rev. 889 (1988). Phelps treats the three levels of narrative in the book—Twain's, Huck's, and the reader's—as a trope for Twain's inquiry into legal authority, which itself exists on at least three levels in the book: civil law, private codes, and what we can roughly call an emerging new law, and the unfolding of narratives offers a parallel in the gradual change in a cultural vision of legal relations, a "law" of community in which Jim can be perceived as person, not property. The book is a narrative of perceptual and emotional change paralleled by a legal change. Civil law and even private code law yield, albeit temporarily, to pre-legal communal relations.

questions about the relation between art and power which few of the rhetorically-oriented law-and-literature writers address.¹²⁵

III.B. JUDICIAL POETICS

Law-literature critics often argue that lawyers who have immersed themselves in imaginative literature have refined abilities to identify and apply moral and political values. In this regard, the relevant legal-literary artists are normally judges (though lawyers who advocate before judges would be obvious corollaries).¹²⁶ Perhaps the most often praised judge in

125. See *supra* notes 32-33 and accompanying text.

126. Ironically, the subject of judicial rhetoric as literature is the one area where Posner does see a fruitful perspective on law-as-literature, yet where he is least convincing, and indeed falls prey to the preciousness of the general run of law-and-literature writing that he otherwise so properly criticizes. Posner examines Holmes's *Lochner* dissent, *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); see R. Posner, at 281-88, as a *tour de force* of rhythm and diction, and vaguely urges lawyers to become more literate in order to write better opinions. In this regard, Posner does little more than what the sentimental law-literature people do when they extol the beauties of a Cardozo statement of facts as a cultural achievement. Having thus praised rhetoric as value, Posner then vaguely addresses the ethical problems of value-free rhetoric, but finesses the matter by holding that good rhetoric may nevertheless serve virtue by sharpening our reasoning. *Id.* at 287-88. Indeed, he falls prey to one of the weakest versions of the sentimental law-and-literature connection by arguing that legal-dialectical argument, as part of the adversary system in general, teaches lawyers the moral and strategic art of empathy for others' perspectives.

Ultimately, Posner takes a strange tangent, though a tangent which enables him to confirm the implicit theme of his whole book. Having argued that the major relationship of literature and judicial opinion writing lies in the overlapping rhetorical arts, Posner then argues why the craft values of literature are the only ones relevant to judicial writing. The reason, somewhat illogically conceived, is that the only other way literature and judicial writing could be related would be in the sense that judges could learn better and more humane political values from reading literature. In short, he adopts a typically binary distinction between form and content, and then argues strongly against judges drawing "content" guidance from literature. *Id.* at 299-302. This is, of course, a weird turn-about, since it drops the subject of judicial opinions as literature and turns to the narrower issue of what judges can learn from literature. But it is an opportunity for Posner to sum up his argument against what he takes to be the pernicious didactic or reductionist view of literature.

To the extent that Posner is denying that more immersion in culture makes judges or other people more humane or more politically or morally principled, or noting that the politics of Yeats and Eliot might constitute a public menace, he is fleshing out the very sound argument he made earlier against the sentimental "humanistic" view of the law-literature connection. But Posner is making a stronger claim, and one more interestingly central to his book: that what he calls reductionist criticism or reading of literature undermines the privileged role of literature in our culture by confounding it with other forms of discourse. He insists again that "aesthetic qualities" of literature are those that transcend

local, time-bound elements, including beliefs that are outmoded. . . . Otherwise these works would not survive into our day, would no longer be literature. *Id.* at 301.

Posner makes a strange connection between the specific social and political context of literature and its didactic content, and puts both on the wrong side of his opposition between the specific and the universal in literature. He resists the notion that the specific world of a novel or drama plays even an intermediating role, much less a generative role, in its larger themes. He elevates literature into fusty Victorian museum work, and thus at the same time puts law into a parallel state of disconnection. He argues that "literature should be a sphere apart," but he is unclear on what it should be apart from. What he means apparently is that he does not want tests of political orthodoxy for literature, but that argument is at least irrelevant to, and possibly contrary to, the argument that literature should be apart from politics or law or anything else. Posner, far better than most of the law-literature writers, recognizes some of the threatening intellectual consequences of identifying bonds among the forms of discourse and language, but he manifests his recognition by suppression.

Posner here thinks the interpretive enterprise irrelevant because he does not treat the judge as he does the legislator. *Id.* at 269. The judge, at least on the common law model, purposely writes opin-

this regard is Cardozo, and typically, Cardozo is credited with a style of narrative and imagistic specificity and precision—as compared to the bland abstraction of lesser judges. Cardozo's linguistic artistry supposedly enables us to see the defendant more fully in his individuality—and in his suffering. We see not just a lawsuit, but a living person encountering pain and death.¹²⁷ Moreover, his opinions achieve metaphoric complexity. A young plaintiff dies on the sands of a river, and we are thus especially struck when Cardozo denigrates the bases of the defendant's legal arguments as ancient property notions standing on "quicksand."¹²⁸ Similarly, imagery of collision describing the plaintiff's encounter with electric wires becomes a complex conceit when Cardozo speaks of the supposed inviolate circle of the defendant's immunity colliding with countervailing rights and interests.¹²⁹

As a first cut, we can generally align linguistic precision with sensitivity to moral value, and abstraction to the opposite. But this is not a compellingly necessary alignment. It denigrates the ethical power of abstract moral reasoning which deductively analyzes weak arguments about rights or spheres of immunity, or the power of highly technical utilitarian arguments about cost-spreading between railroads and children. Conversely, it ignores the possibility, at least on different facts, of highly poetic descriptions of conflicts that create sentimentally congratulatory pictures of ancient rights of property. To the extent that Cardozo's precision helps him judge the case aright, we are not seeing much more than conventionally good lawyering of the facts and advocacy of a legal principle. And if one sees more than that, one might begin to note that Cardozo commits the artistic sin, quite typical of him, of self-indulgence in his pleasures of metaphor-making, as well as political arbitrariness in his smuggled legal conclusions.¹³⁰

ions which are to be modified in light of later wisdom or conditions. Thus, the determinacy issue that for Posner should constrain the role of interpretation of statutes does not apply. This is odd: One would think that at least lower-court judges face problems with higher-court "signals" not categorically different from the ones they face with statutes. The higher-court opinion, of course, offers more help because it is likely to contain its own explicit rationale, but that rationale is itself a textual communication which will require interpretation, and indeed is the best example in law of the problem of textuality, of writers helplessly participating in the use of a symbolic currency whose older and future meanings they cannot wholly control.

Posner even fails to develop his one very pregnant point—that there is a "realist" style of discourse that might unite legal with literary realism. *Id.* at 287; see Hopkins, *Development of Realism in Law and Literature in the Period 1883-1933: The Cultural Resemblance*, 4 Pace L. Rev. 29 (1983) (interesting treatment of this very subject). He treats opinions solely as controlled acts of reasoning and persuasion, never the inadvertent reflections of ideology or social reality.

127. See *Hynes v. New York Cent. R.R.*, 231 N.Y. 229, 131 N.E. 898 (1921). Where another judge sees an abstract "plaintiff," Cardozo sees a "young lad" destroyed. Weisberg & Barricelli, *Literature in Law*, in *Interrelations of Literature* 150, 173 (J. Barricelli & J. Gibaldi eds. 1982).

128. Weisberg & Barricelli, *supra* note 127, at 173 (1982).

129. *Id.*

130. For a critique of the famous *Palsgraf* opinion in this regard, see J. Noonan, *Persons and Masks of the Law* 133-39 (1976). Indeed Richard Weisberg's own work illustrates this. In his essay on *Billy Budd*, he draws analogies to the deceptive literary manipulation of Justice Rehnquist, noting

In a parallel manner, James B. White describes an (admittedly exaggerated) version of conceptual or propositional thinking and says that a unified view of law and literature can counteract its dangers. He attacks the idea that "concepts" of things like rights, freedom, honor, and so forth, are trans-cultural and not language-dependent:

And, more deeply, poets have always known that life cannot be reduced to systems and schemes. In their poems they often seek to capture assertion and denial at once, to carry the reader to the point where languages break down.¹³¹

White argues that ontological relativism is not the same as moral relativism. If anything, we can ground our convictions better if we examine them more self-consciously in our contexts, not displacing them onto concepts. So literary discourse has an active ethical significance. It acknowledges the "other," in all senses of that term. Conceptual talk is too aggressive—too full of territorial staking out. What White calls literary language is more modest, more aware that no one can be compelled to submit to an idea, that all categories are evanescent. White makes the related assumption that literature is valuable because it is anti-theoretical and anti-conceptual.¹³²

I find White's somewhat cloying anti-conceptualism to pose not so much an attack on the dangers of conceptualism, as a preemptive evasion of the implications of anti-conceptualism. Aligning the concrete with the humanely sensitive or the properly critical, and the abstract with the insensitive or the uncritical, is one of the entailments of much of the law-literature writing. It is true that treating discrete individuals as members of an aggregated, abstractly defined class can sometimes lead to unsound legal and political judgments. But it is also true that much concrete description of human situations wallows in concrete detail that provides no greater sense of moral and political salience than abstract prose.

It is also true that there can be something deceptive, or self-deceptive, about concrete description. It can be irrelevant to the moral and political issues or it can be the wrong concrete description of them,¹³³ but it never-

the Justice's literary skills in creating sympathetic protagonists out of the political devils of a major civil rights case, depicting them as noble public servants during "the Christmas season." Through narrative emphasis, manipulation of perspective, and so on, Rehnquist focuses human sympathy on the agents of the state. Richard Weisberg, *supra* note 110, at 44.

131. White, *Thinking About Language*, 96 Yale L.J. 1960, 1979-80 (1986).

132. *Id.*

133. This is a problem with John Noonan's well-known paean to a more literary approach to case law. J. Noonan, *Persons and Masks of the Law* (1976). As demonstrated by his critique (ironically) of Cardozo's *Palsgraf* opinion; *id.* at 111-67, Noonan's passionate argument for piercing masks to see the people under the law leaves one perplexed as to what difference it makes legally. He vaguely implies that Cardozo, wifeless and childless, was insensitive to the pleas of a single mother of three children living on a janitress' salary. But he is unwilling to say that these facts should have changed the decision—save for the award of court costs to the loser—intimating merely that the facts

theless is likely to create the impression of sounder judgment, and therefore tends to mask bad judgment.¹³⁴ In the hands of a Cardozo, it can become an instrument not of sharpened feeling, but of sentimentality. Sentimentality is a more pernicious failure of feeling than the use of abstract language utterly lacking in emotive or descriptive content, precisely because it disguises its own abstraction in apparently humane emotion and descriptive specificity. Indeed, one thing that results from immersion in the particulars is a helpless sense that acts are so overdetermined, so complexly caused by nets of local circumstance, that we cannot in any salient way assign or attribute cause, or that ultimately we cease to believe in volition.¹³⁵

Using the language of cost-benefit analysis does not necessarily require or indeed cause anyone to wrongly place a finite value on human life if he would not otherwise do so. Indeed, this language is just as likely to cause someone to recognize that otherwise appropriate instrumental concerns and quantitative measures fail when confronting the potential sacrifice of life. Indeed, I am not even sure if the language of cost-benefit analysis entails more abstraction in the first place than, say, natural rights theory. The concrete can obfuscate and euphemize far better than the abstract, precisely because it does not appear to be doing so. Economic prose is in fact allied with literary prose in its utility in attacking legal prose, whose conceptual faults are far different.¹³⁶

"increase our understanding of the legal process." His concern is

what a legal historian should record, what a legal philosopher should explain, what a law professor should teach. Only indirectly do these matters suggest how a judge should judge.

But if we are searching for guides to salience, no one suggests that they may be limited to the salience needed by a deciding judge. The question remains how these facts are salient for the scholar. At best we have a mildly psychoanalytic explanation that Cardozo's discomfort over his father's public disgrace caused him to be aloof and abstract in his treatment of legal actors, which is strange, considering that most of the law-as-literature writers, as we have seen, treat him as just the opposite.

134. See I. Kant, *Foundations of the Metaphysics of Morals*, 409 (L. Beck ed. trans. 1949):

Nor could one give poorer counsel to morality than to attempt to derive it from examples. For each example of morality which is exhibited to me must itself have been previously judged according to principles of morality to see whether it is worthy to serve as an original example. . . . But whence do we have the concept of God as the highest good? Solely from the idea of moral perfection which reason formulates a priori. . . . Imitation has no place in moral matters, and examples serve only for encouragement. That is, they put beyond question the practicability of what the law commands, and they make visible that which the practical rule expresses more generally. But they can never justify our guiding ourselves by examples and setting aside their true original which lies in reason.

135. See Unpublished Letters of Justice Holmes 255-56, where Holmes reminds John Wu:

If a boy gets his finger pinched between two inward revolving wheels, it will probably only distract attention and bore the reader to describe the machinery.

136. The economist Donald McCloskey offers a useful, somewhat different angle on this issue. McCloskey, *The Rhetoric of Law and Economics*, 86 Mich. L. Rev. 752 (1988). Like White, McCloskey argues against the pretenses of scientific vocabulary in economics. Like White, he believes that good social science is, in the best sense, a form of rhetoric, so he wants us to see that most economists are really smuggling rhetoric into their analyses. In fact, in considering how economic language has invaded law, he argues for recognizing how much legal language is really part of economics, in the sense that law typifies the "social reasoning" that he sees at the core of constructive rhetoric. *Id.* at 753. In attacking pretentious scientism, though, his alternative is not *necessarily* the concrete, imagistic particularity we supposedly draw from literature when we apply literary principles

If White's goal is to identify the language, or attitude toward language, which makes possible a legal scholarship of deep cultural criticism, he exaggerates the oppositions. The morally enthralling opinions of Holmes and Brandeis more often use the rhetoric of the unsupported assertion or the sociological generalization than literary descriptions of plaintiffs. Abstract deductive thinking can be the rhetoric of powerful moral enlightenment. One example is the abstracted, deductive natural law rhetoric of Paine in his attack on what he saw as the stifling, paralyzing immersion in imagistic detail of Burke. Paine derogates the

tragic paintings by which Mr. Burke has outraged his own imagination. . . . But Mr. Burke should recollect that he is writing history, and not *plays*. . . . Notwithstanding Mr. Burke's horrid paintings, when the French Revolution is compared with that of other countries, the astonishment will be, that it is marked with so few sacrifices; but this astonishment will cease when we reflect that *principles* and not *persons*, were the meditated objects of destruction. The mind of the nation was acted upon by a higher stimulus than what the consideration of persons could inspire. . . .¹³⁷

Another example is the deductive aggressiveness of Bentham in attacking what he similarly saw as the paralyzing adherence to the aesthetic elegance of tradition in Blackstone.¹³⁸ Bentham objected to Blackstone's use of metaphor and thought linguistic imprecision the source of injustice. Thus Blackstone, by analogy to Burke, could write:

Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers . . . etc.¹³⁹

Blackstone sees intricacy in the state of the law, and therefore sees it complexly determined by history. Bentham, on the other hand, instead of studying specific institutions, simply deduced utopian proposals from the abstraction of the utility principle.¹⁴⁰

to law. It is simply the forms of ethical and analogical reasoning we associate with law and philosophy. It is not so much conceptualism but cruder scientism that is the enemy of good law. *Id.* at 764-67.

137. T. Paine, *The Rights of Man* 286-87 (Dolphin ed.).

138. In a remarkable earlier essay, Posner praises Blackstone for embedding his view of the law firmly in social and political conditions, for seeing law as an organic system, not abstraction. Blackstone uses history in the Holmesian manner to illustrate the original purpose of a rule, to discredit its original form by showing that conditions that gave rise to it have changed, and to thereby justify legal fictions judges use to change it. Posner, *Blackstone and Bentham*, 19 J.L. Econ. 569 (1976).

139. 3 W. Blackstone, *Commentaries* *268.

140. Indeed, one of Bentham's goals was to purify language of metaphor and ambiguity, Posner, *supra* note 138, at 599, 602, though Posner himself derogates the effort as the first invention of Newspeak. Bentham wants language to be transparent, while Blackstone, in Posner's view, sees linguistic complexity as the main stabilizing force in society. I should therefore note here that I find perfectly sensible one particular section of Posner's new book: his attack on the attacks on his rhetoric

III.C. INTERPRETATION

The other key subpart of the law-as-literature enterprise, and the one which has been most prominent among law-literature writers, is the hermeneutic subpart. Roughly, this concerns the contemporary interest in the techniques of literary criticism being applied to judicial opinions and statutes in order to discern their meaning. As with the style-and-rhetoric part of law-as-literature, this does not necessarily connect law to literature except in a very attenuated sense. The art or science of hermeneutics historically derives from the reading of scripture. Though very adaptable to literature, it is not necessarily more adaptable to literature than to other forms of discourse.

Even where we do accept an interesting link between the interpretive arts and literature, it invites yet again a sentimental or self-congratulatory version of the law-literature connection. Lawyers associate their difficulty in construing legal prose with the more prestigious difficulties of construing literature. We lawyers, like literary critics, are concerned with the limits of language, the elusive search for truth, and so on. Or if we are inclined to do rather fuzzy interpretation of statutes for political purposes about which we feel insecure, we can note that literary criticism teaches us the power of analogical reasoning. The garnering of prestige may work the opposite way as well, as literary critics insecure about the ethereal nature of their work tie themselves to the world of power by serving as consultants to lawyers and judges. All this is very ironic. In modern critical theory, to extend the forms of literary criticism to allegedly non-literary works is a manner of subverting cultural elitism, of denying the "privileged" status of what we call literature. So it is odd to see the argument that the connection between law and literature may enhance rather than undermine the prestige of both sides of the enterprise.

In any event, apart from the problem of self-congratulation, it is unclear what is accomplished by the parallelism. Lawyers and literary critics may borrow from a common fund of knowledge and art about such matters as plain meaning, authorial intention, assumptions of organic coherence, and so on, but to note these parallels is not necessarily to enhance our understanding of either the law or the literature. Even a fine study like Kenneth Abraham's essay on the common concerns of legal and poetic interpretation barely touches the issue of what we are to glean from the

as the source of the unsound politics his critics attribute to him. R. Posner, at 309-16. The standard line in this regard holds that obsession with abstracted efficiency concerns distorts human reality and negates any chance at morally creative uses of law. First, I doubt that Posner's abstracted discourse—if it is abstracted—causes his view of the world. At best, the significance of his abstracted language—if it is abstracted—is that it might be offered to otherwise obtuse readers to help them recognize the substantive unsoundness of his approach to law. But that still leaves the question whether there is any natural association, even at this evidentiary and not causative level, between abstracted conceptual discourse and unjust distortion of human reality.

observation that the concerns are common.¹⁴¹ Chiefly, we get a sort of syllogism that law and literature are related, that meaning in literature is highly contestable, and that therefore meaning in law may be indeterminate. Beyond that we learn that to the extent that law and literature are not alike, the difference is due to the special professional concerns of and constraints on lawyers, and so we infer that we might profitably study the professional concerns of and constraints on literary critics. But the latter potential insight is far more helpful in studying literature than law.

The writing over the last decade that has focused on the problems of objectivity and interpretation has tried with some greater sophistication to test the aptness of the law-as-literature analogy. The Dworkin-Fish-Fiss-Levinson enterprise has, in a sense, borrowed from the world of literature in applying to law problems of discerning the authorial intention underlying statutes or constitutions, as well as certain conventional non-intentionalist (essentially mildly New Critical) matters of thematic coherence or organization.¹⁴²

The debate has been all-too-often reviewed, and the gist is roughly as follows. Once we call judicial opinions "texts" or describe judicial activity as "interpretation," we face a scary problem of restraining judicial discretion. Thus, Sanford Levinson argues for the significance of discovering the subtle essence of the Constitution—that it is *written*.¹⁴³ The writtenness gives it its special American authority, yet at the same time supplies its mystery, since, in Roland Barthes' terms, writing "manifests an essence and holds the threat of a secret."¹⁴⁴ For Levinson, to treat law as literature is to invite the issue of indeterminacy, to subject law to the malaise he sees in modernist and postmodernist theory, traceable to the self-referential quality of literature. The link to literature invites raw Nietzschean freedom into law, for judges to beat the text into whatever shape they wish.¹⁴⁵ Levinson's somewhat florid view of the significance of the law-as-literature analogy casts common concerns about indeterminacy in a compellingly deconstructionist tone, though his argument is questionable in both premise¹⁴⁶ and conclusion.¹⁴⁷

141. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 21 Rutgers L. Rev. 676 (1979).

142. Dworkin, *supra* note 18; Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, in *The Politics of Interpretation* 27 (1983); Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739 (1982); Levinson, *Law as Literature*, 60 Tex. L. Rev. 373 (1982).

143. Levinson, *Law as Literature*, 60 Tex. L. Rev. 373 (1982).

144. R. Barthes, *Writing Degree Zero* 19-20 (A. Lavers & C. Smith trans. 1978), *quoted in* Levinson, *supra* note 143, at 375.

145. Levinson, *supra* note 143, at 384-85.

146. One problem concerns the truth of Levinson's fundamental observation of indeterminacy or his inference of indeterminacy as the main lesson to be drawn from the literary analogy. Richard Weisberg, *On the Use and Abuse of Nietzsche for Modern Constitutional Theory*, in *Interpreting Law and Literature* (S. Levinson & S. Mailloux eds. 1988). The jump to indeterminacy may be a non sequitur based on a very narrowly wooden standard of plain patent meaning in literary texts. It ignores the powerful objective role of context and suffers from an impoverished appreciation of the

III.D. ARTISTIC CONSTRAINTS

Dworkin addresses the problem of indeterminacy by invoking an odd aesthetic model: Treat each new judicial act as the next link in a "chain" novel, in which the earlier intellectual, moral, and formal choices will govern, but not absolutely determine, the next step.¹⁴⁸ Owen Fiss's approach is to argue that judges must act "objectively," but that their objectivity will come not so much from the determinate nature of the text as from the determining power of the interpreting community, which operates under various normative grammars established by law and political consensus.¹⁴⁹ Stanley Fish argues that both Dworkin and Fiss greatly exaggerate the determining powers of precedent or interpretive communities, but reassures us that though each new judicial actor has theoretically complete, unconstrained discretion, the pragmatics of his professional situation will deliver a result within the comfortable range we were hoping for anyway.¹⁵⁰

range of collateral materials available to assist interpretation. Moreover, in its premature philosophical pessimism, it may take the form of a dangerously reactionary kind of self-indulgence.

147. The second problem concerns not the original observation about indeterminacy, but the pessimistic conclusion, as exemplified by Richard Rorty's rather calming treatment of the parallel problem in philosophy. In Rorty's vision of the fulfillment of pragmatism in a "post-philosophical culture," even science would be viewed as simply a genre of literature:

Physics is a way of trying to cope with various bits of the universe; ethics is a matter of trying to cope with other bits. Mathematics helps physics do its job; literature and the arts help ethics do its. Some of these inquiries come up with propositions, some with narratives, some with paintings. The question of what propositions to assert, which pictures to look at, what narratives to listen to and comment on and retell, are all questions about what will help us get what we want (or about what we *should* want). R. Rorty, *Consequences of Pragmatism* xliii (1982).

Compare Richard Rorty's ironic "distinction" between epistemology and hermeneutics as purely one of familiarity. We will be epistemological where we understand perfectly well what is happening but want to codify it in order to extend, or strengthen, or teach, or "ground" it. We must be hermeneutical where we do not understand what is happening but are honest enough to admit it, rather than being *blatantly* "Whiggish" about it. R. Rorty, *Philosophy and the Mirror of Nature* 321 (1979).

Thus, Rorty thinks we should have long ago overcome our Kantian impulses that treat truth as a vertical relationship between representations and what is represented, rather than a horizontal one between and among representations. Rorty easily accommodates Derrida, wondering

What must philosophers who object to this characterization think *writing* is, that they should find the notion that that is what they are doing so offensive? R. Rorty, *Consequences of Pragmatism* at 94.

148. Dworkin, *supra* note 18. Recall also that as a substantive corollary to this formal model, Dworkin believes in consensus policies or recognized principles that have some objective power to constrain decisions.

149. Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739 (1982); *Conventionalism*, 58 S. Cal. L. Rev. 177 (1985). James B. White offers a compromise: the text creates the community of readers. Reading is a perpetual interchange between the person that a text asks you to become and the other things you are. White reassures us against fears of nihilism by stressing the grounding of meaning in meaningful interpretive conversation. J.B. White, *Heracles' Bow* (1985), at 80.

150. Fish, *Interpretation and the Pluralist Vision*, 60 Tex. L. Rev. 495, 501 (1982). Fish seems to acknowledge more than the others the problem of "textuality" and thus to address the more disturbing implications of the assumption that practitioners of various discourses cannot rationally treat their enterprises as separate and objectively verifiable activities. But Fish typically retreats into complacent assumptions that indeterminacy does not exist at the institutional level at which it would be most dangerous. He thereby retreats from any troublesome implications about the unity of discourse

This work has produced some interesting debate about constraints on judicial discretion, but I do not think it has ventured far enough from the usual terms of legal debate to ponder the implications of a connection between law and literature. The interpretation debate has only vaguely invoked, and rarely addressed, these wider questions about the underlying premises or goals of the law-literature enterprise. The obsession that some of the entrepreneurs have had with interpretation has been a diversion from the more important issues.

Indeed, as Judith Schelly has nicely argued, there is less debate here than the debaters believe.¹⁵¹ All seek a middle ground between rigid authority and nihilism—for all, it is both a moral and an aesthetic position. For all, establishing meaning is an act that has social and political roots, but raises aesthetic problems of coherence and formal integrity and complexity. I want to take Schelly's argument a step further to find the weak common denominator in the debate.

The implied premise of most of the interpretation writing seems to run as follows: As we try to construe law, we are attracted to literature because it is a zone of freer play about interpretation. But we then see the flip side; we recognize that literature is far more freely interpretable than law because (a) its linguistic and imaginative resources are greater, and (b) it is under no political constraint to make its meaning accessible. So we immediately fear that having invoked the law-literature connection, we have also invoked the political problem of "uncanalized" construction, or reconstruction, or destruction (or deconstruction) of law, and we immediately proceed to argue for and against the inherent self-restraining powers of various interpretive methods we have borrowed from literary criticism.

Thus, the enterprise begins to work backward, with Fiss arguing for the restraining power of interpretive communities (the grammatical norms), or Dworkin the restraining power of enlightened principles (aesthetic objectivity), or Fish's breezy assurance of practical context constraints.¹⁵² Now of course I am exaggerating the negative side of this. Both Fiss and Dworkin are also arguing affirmatively for the creative powers of their methods.¹⁵³ But the defensive-restraint arguments remain

by assuring us that at the relevant sociological, if not textual, level, there are indeed separate spheres of discourse. Fish, *Fish v. Fiss*, 36 Stan. L. Rev. 1325 (1984). Fish notes that rules only constrain interpretation of texts if they are not themselves texts. The question, then, is how Fish avoids any nihilistic inference from his view of textuality, i.e., we are always caught in our interpretive constructs, even when we are making this very observation. For Fish, there is no real danger of caprice in interpretation, because the interpreter does not really choose interpretation—she is still constrained by the professional community of discourse. All our judgments of right and wrong occur within assumptions we cannot wholly control or choose.

151. Schelly, *Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer Among the Gahuku-Gama)*, 73 Calif. L. Rev. 158 (1985).

152. Fish, *supra* note 150.

153. Fiss argues that legal interpretation makes it possible for judges to discover public moral and social values that will inform their decisions. See Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739, 745-47 (1982). For criticism of Fiss's notion that a judge can legitimately "give meaning to

paramount because of a more fundamental premise of the interpretation writing. This premise can simply be called the case-or-controversy requirement or the dispute resolution model. We connect law to literature only from the very narrow perspective of a judge construing a document of positive law to determine how it regulates social behavior. Thus, its premise about textuality, or about the law-literature enterprise generally, is the very narrow one I just described.

But why the focus on interpretation in this sense? The very goal of interpretation makes assertions about the breadth of cultural meaning. First, and perhaps less important, even if we are concerned with meaning in the deliberate expressive sense, the focus on interpretation misses an entire level of literary meaning which may sometimes be apposite to law: vatic, or inspirational meaning.¹⁵⁴ As Susan Sontag has argued, the focus on interpretation, the "revenge of the intellect upon art," has as its premise a wholly mimetic view of art.¹⁵⁵ By analogy in law, it assumes that the only value of literary insights is to enable lawyers and judges to "mime," to represent or reproduce, the acts of lawmakers in a very narrow context: to determine what they meant their law to do, the better for us to obey them.

But there are other ways of "studying" art as well as law. After going to the trouble of treating a legal document as the equivalent of a literary text, why then narrowly treat its utility as merely deliberate significance, as opposed to its potentially much wider utility as cultural datum? The interpretation debaters seem to recognize vaguely the subversive implications of treating legal discourse as somehow continuous with literary discourse. But their perception of the subversive power is incomplete: They smell a problem of indeterminacy, but only in the rather mundane sense that they are borrowing from a model of discourse that, as a practical matter, lacks or does not need political constraints.

The interpretation debate does not follow out the consequences of the otherwise rather precious view that law and literature are parallel linguistic phenomena concerned with ambiguity and meaning. It never reaches the anthropological view that both law and literature are part of the formal archaeology of a culture. Indeed, it never even reaches the simple literary view that the work of literature may be as much an artifact as an authorial communication to readers. In modern critical terms, it seeks to interpret, but not to explain.¹⁵⁶ It treats the legal text as a communication

our public values," see Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 Stan. L. Rev. 213, 241 (1983).

154. For a history of the treatment of the Constitution as inspirational scripture in America, see M. Kammen, *A Machine That Would Go of Itself* (1986).

155. S. Sontag, *Against Interpretation* (1964).

156. For a critique of the notion of explanation as a substitute for interpretation, largely within Marxist writing, see H. Felperin, *supra* note 102, at 57-58 (1985). For an excellent example of intellectual archaeology and mapping of a classic legal thinker, see Kennedy, *The Structure of Black-*

from or between lawmakers, and not as a container of meaning or an exercise of power or bonding.

III.E. POSNER ON INTERPRETATION

Posner is predictably negative on the interpretation issue. Once again, however, his criticism, though perhaps accurate as to some specific scholarship, both misapprehends the fruitful possibilities in law-as-literature studies, and, ironically, illuminates the way that in his work an impoverished view of literature entails the misapprehension. Posner's basic argument here is that literary criticism has virtually nothing helpful to teach those whose task is interpretation of legal authorities.¹⁵⁷ If the contemporary law-as-literature interpretationists do not ignore some of the more troublesome consequences of asserting a linkage between aesthetic and political power, Posner in effect does implicitly recognize those consequences, and recoils from them so dramatically as to deny any possible connection.

Posner's argument works as follows, using a series of assumptions and non-sequiturs. He says that literature is not subject to singular interpretation—in particular modern literary criticism has shown that meaning cannot be reduced to authorial intention. He then says that to treat legal authorities as literature for purposes of interpretation is to allow legal authorities to be interpreted as openly and pluralistically as literature. He says this is impossible, and offers two clumsily related reasons. First, he argues that this sort of literary interpretation is politically unacceptable, for the obvious reason that it would grant overwhelming and “untrammeled” interpretive discretion to the interpreters, i.e., judges.¹⁵⁸

Second, as if recognizing the circularity of that argument, he then gets more specific and says that statutes and constitutions are not written with and for the same purposes as are literary works. Legal pronouncements are designed to be determinate communications, and where they are necessarily or negligently unclear, they nevertheless contain a meta-communication that unclarities are to be resolved according to some fairly conventional construction or reconstruction of implied intent. This part of Posner's argument is disappointingly disingenuous, because it essentially ignores all the perfectly standard attacks within the legal scholarship about the difficulty of comprehending and identifying collective intent.¹⁵⁹ Dramatically summing up, Posner declares himself a strict intentionalist

Stone's Commentaries, 28 Buffalo L. Rev. 205 (1979).

157. R. Posner, at 218.

158. *Id.* at 227.

159. *E.g.*, Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204 (1980). Indeed, Posner's legal example here is disappointingly banal. He invokes the tired old issue of the open and textual meaning of the Eighth Amendment in regard to capital punishment.

in law and a flexible New Critic in literature.¹⁶⁰ Yet his paradigmatic binary opposition ends in a pair of polar caricatures.

More specifically, Posner recognizes that invoking literary interpretation these days inevitably means invoking deconstruction, which he sees in rather obvious ways as inviting political nihilism. Though he purports to recognize that much deconstruction is just a skeptical, not a nihilistic, form of interpretation, he essentially refuses to accept that deconstruction can have any legitimate consequences for law.¹⁶¹ The problem is that while many of the law-as-literature people have taken a narrow or precious view of the phenomenon of textuality, Posner never recognizes it as a phenomenon at all. He does not consider new judicial readings of statutes or constitutions as transformations and possibly creative misreadings, because he has an exaggerated sense of an author's degree of control of his text both as he is writing it and after it is written. If extrinsic evidence of intention shows, for example, that the authors of the equal protection clause never intended forced school integration, we would still be left with the problem that they released into the world legal language which participates in wider principles of equality which ultimately will implicate school integration.¹⁶²

Using language assumes risk; using language also fulfills the risk created by previous language users whose precedent we participate in. Posner is concerned with miscommunications by statute writers and the necessity of judicial interpolation,¹⁶³ but his view of the problem is linear: He never treats it as a wider problem of being unable to prevent our words from saying more than we mean. Language, and most certainly legal language, is taken from a store of cultural capital, and its borrowers run the risk of its negotiability. So to say that it is politically illegitimate to borrow from the free play of literature and impose this flexibility on law is to miss the point that if there is any linkage among forms of discourse at all, dangerous consequences may be inevitable. Posner inevitably falls back on his circular notion of political illegitimacy or his somewhat linear notion of controlling purpose.

The poet, unlike the legislator, is "unhampered by command responsibilities," which is to say that his political role is unhampered by his culture.¹⁶⁴ This is a strictly normative argument of no analytic power. Posner says that it would be terrible for lawmakers to have too much discretion, so we must establish that they have never exercised any. A statute is not an effort to create a work of art, so artistic criteria have no relevance. Posner offers other rather illogical distinctions between law and poetry.

160. R. Posner, at 211, 218.

161. *Id.* at 216.

162. Balkin, *Deconstructive Practice and Legal Theory*, 96 Yale L.J. 743 (1987).

163. R. Posner, at 240.

164. *Id.* at 240-41.

He says that statutes cannot be subjected to the critical standard or criterion of total organic coherence, because they are so hastily drafted.¹⁶⁵ This, of course, ignores the possibility of unity in a collective work due to unconscious or latent cultural unity or expressive rhetorical forms within the collective. Posner says that unlike lawmakers, literary critics work in a competitive market, whereas at least Supreme Court lawmakers have a monopoly on meaning-making.¹⁶⁶ This distinction is obviously weak. Even the highest judges act in a competitive market for ideology, and, regardless of their power of finality, they are often culturally constrained by their roles to participate in standard cultural formulations. Posner also argues that statutes have legislative histories that can be guides to meaning; there is no analogous individual history of a literary work. This distinction misses the standard point that legislative history is normally an unreliable guide to meaning, in part because of the multiplicity of authors which Posner has relied on to distinguish statutes from poems.¹⁶⁷

Posner offers only a caricature of deconstruction, not just because he refuses to see it as anything but nihilistic, and not just because he engages in circular reasoning about determinate readings as political necessities. Rather, like the interpretationists themselves, he seems trapped into viewing literary theory as relevant to law only in the very narrow sense of the case-or-controversy requirement. He never treats the possibility of borrowing literary approaches to see legal documents as cultural data, to mine them as a literary anthropologist, to see their meanings, not their holdings.

Posner tries to play out the other side of his argument by demonstrating the problems of applying intentionalism in literature. The problem is that here too his view is gravely limited. To some extent, it is the flip side of his argument about law. That is, because it is relatively politically harmless to have multiple interpretations about literature, multiple interpretations are legitimate. But more striking is his narrow and distorting sense of intent. He treats it in part as the specific extrinsic things the author says about the poem.¹⁶⁸ But he also connects that notion of intentionalism to a poem's specific social and political context so that here, as earlier, he is arguing for a denatured, purportedly "universal" reading of literature.

165. *Id.* at 256.

166. *Id.* at 249.

167. *E.g.*, R. Dickerson, *The Interpretation and Application of Statutes* 131-95 (1975).

168. R. Posner, at 231. Ironically, where there is firm factual, extrinsic evidence of an author's intent, Posner finesses the matter anyway by saying that most great literature is inspired, automatic writing. Once again, this is a binary opposition with nothing mediating between the extremes. Incidentally, Posner treats Eliot's ironic dismissal of *The Waste Land*—"[It is] only the relief of a personal and wholly insignificant grouse against life; it is just a piece of rhythmical grumbling"—as evidence of the triviality and irrelevance of authorial statements of intent. *Id.* Quite the contrary. When I taught Eliot to undergraduates, I found this wonderful remark a great corrective to the general tendency to read the poem merely as an abstracted piece of cultural history, rather than a plaintive post-Romantic lyric.

His curious example is one of Yeats's greatest poems, "Easter 1916."¹⁶⁹ Posner's idea is that while a non-originalist reading of the Eighth Amendment is politically illegitimate, what he views as the binarily-opposed originalist reading of "Easter 1916" is banal. Posner concedes that the poem is "in some sense" about real facts and characters. But ultimately, and after conceding the dangers of poetic paraphrase, he nevertheless treats the poem as a general statement of the danger that political passion can harden human hearts. This the poem doubtless is to some extent. But to treat its specific context, and even the available extrinsic evidence thereof, as the merely adventitious occasion for a general pronouncement leaves unanswered the question of why this is one of the great public or political poems of all time.

It is more than a tangential curiosity to know of the complex triangular relationship of Maud Gonne, Captain John MacBride, and Yeats, or to know of the social and cultural roles played in the rebellion by artistic figures like Padraic Pearse and Thomas MacDonagh. If we do not know how and why Maud Gonne became the Helen of Yeats' dreams, we miss the significance of the Homeric analogy in light of Yeats's work as a whole. If we do not know why John MacBride was for Yeats a demagogue, we do not fully appreciate the grandiloquent generosity of Yeats's recognition of MacBride's heroic transformation, or the irony that circumstances as much as character accounted for the transformation.¹⁷⁰

The power of Yeats's "topical" poetry derives from the agony of his effort to transcend history.¹⁷¹ Without the density of particulars in his best political and historical poems, we would get no sense of why the effort is agonizing. Superficially, any detail in the poem would do, to the extent that the detail generically represents raw history. But without a sense of why Yeats's life is entangled with *these* particulars, we cannot fully appreciate or explain why Yeats derives more moral and spiritual energy from his context than does, say, a Wilfred Owen or a Rupert Brooke. The great advantage Yeats had in an insular country was that Irish politics were personal and domestic, so that, as Thomas Edwards has shown, Yeats, in treating history, acted as a living poet, not as a Spenglerian cultural historian.¹⁷²

The problem, of course, is that virtually all the helpful facts about these matters lie outside the poem. Thus, a strict new critical approach to the

169. *Id.* at 224-26.

170. See T. Edwards, *Imagination and Power: A Study of Poetry on Public Themes* 185-96 (1971).

171. T. Whitaker, *Swan and Shadow: Yeats's Dialogue With History* 273-74 (1964).

172. T. Edwards, *supra* note 170. One result, in regard to what I discussed earlier as the specific gravity of political context, is that one "understands" the poem better when one can locate it as a product of Yeats' specific and ambivalent relationship to Ireland, to politics, to heroism. Yeats was personally alienated from both the class and religion that would be mythologized in his poems. He is at war with Catholic Nationalist politics—that is why he sees "terrible beauty." T. Eagleton, *Criticism and Ideology* 152 (1983).

text would have to exclude them as irrelevant to the immediate apprehension of the artifact. But that may simply argue for taking more than a new critical approach to the poem; this may be one of those poems which demands different treatment. For one thing, what this narrow new critical approach would miss is the significance of the poem in the wider context of Yeats' political poetry. To take the "oeuvre" approach here is very different from taking a narrowly intentionalist view of the poem. It is to look at aesthetics, not autobiography, but to take a larger chunk of aesthetics.

III.F. UNITY OF DISCOURSE

The form and content of cultural products are intimately related. Perhaps the richest ground for dialectical study is literature (or music or art—I mean art, broadly defined, as opposed to other forms of discourse like science or social science), because it is in literature that we recognize most immediately this aesthetic premise that form and content are intertwined. Now to say this is also to say that the richest cultural study assumes that at some level all parts of a culture are unified. This may not be categorically true, but the essence of dialectical thinking is to assume, for creative purposes, that the counter-intuitive is true. That is why, for example, as Frederic Jameson describes the work of Theodor Adorno, we can understand why mathematical music and logical positivism both arise in Vienna, where quantitative intellectual capacities are underused because material forces lagged behind technology, where the supposedly purely formal matter of violin concertos is related to notions of subjective consciousness.¹⁷³

The interpretation debaters have taken a restrained and negative view: Literature is the form of discourse that has less determinate meaning than other forms of discourse because there are fewer political constraints on it. But there is a richer lesson to be derived from linking law and literature: that the supposedly different forms of discourse in a culture are linked at some level in symbiosis or conspiracy. Literature transforms ordinary speech. It is a use of language or of linguistic structures or narrative formulas which makes us unusually self-conscious about how these phenomena act on us. It is most obviously in literature—and then true, by analogy, in forms of discourse to which literature is allied—that we begin to recognize the discourse as performed in quotation marks. Literature is in these senses the proto- or ultimate form of discourse, because it is the form of discourse that most starkly forces us to see that we are engaged in a constructing activity called discourse.¹⁷⁴

173. F. Jameson, *Marxism and Form* 3-19 (1971).

174. *Id.* Roman Jakobson describes this phenomenon nicely when he speaks of the "palpability of signs, of semantically saturated redundancy." See Jakobson, *Closing Statement: Linguistics and Poet-*

As we “do” law, we should become more self-conscious of the constructing acts we are engaged in. But we should also begin to realize a greater continuity among the various types of discourse. It is chiefly in literature that we can or are willing to experience the self-consciousness of form, but we can begin to experience it in other areas where we had repressed it because we thought our activities were purely logical, or mimetic, or inspired. We thus begin to perceive deeper common structures to all forms of cultural discourse, and have to confront the implications of that deeper commonality.

Inevitably, I have to bring some standard doctrines of post-structuralism to bear on this issue. The common denominators of the two otherwise very disparate key figures, Derrida and Foucault, are: (a) Both are concerned with identifying an elusive phenomenon called textuality, which is so general in a culture as to assume a unity of discourse. (b) For each of these thinkers, the implications of a unity of discourse are revolutionary or at least discomfiting. Thus, even if we eschew larger issues of the look of a world where law and letters are unified, we must confront the critical implications for a particular form of discourse of the notion that it is unified with other forms of discourse, that it is part of a larger phenomenon we can call “textuality.” I would argue that as with the implication of an organic view of culture, the unity of discourse argument is a potentially subversive one, and that law-literature writers accomplish little if they do not address this potential subversion.¹⁷⁵

ics, in *Style in Language* (T. Sebeok ed. 1960); T. Eagleton, *Literary Theory* 98-99 (1983).

175. Even before we confront the post-structuralist implications of this linkage of discourse, we should note that conventional structuralism itself is the most fundamental version of the unity of discourse. Structuralism purports to reach far enough down into the mental forms of our culture, indeed down to a kind of imaginative neurology, as to get below the level which separates one form of discourse from another. In particular, as structuralism derives from linguistics, the mental forms it identifies would be fundamental to all uses of language. See generally F. Jameson, *The Prison House of Language* 101-216 (1972). There is therefore something potentially subversive about even modest, conventional structuralism, because it suggests a demystification of the literary and the lack of control an author has of his discourse. See Heller, *Structuralism and Critique*, 36 *Stan. L. Rev.* 127 (1984); T. Eagleton, *Literary Theory* 106 (1983). But structuralism, despite this conceptual potential, did not attack very aggressively the “privileged” status of literature. Indeed, structuralism seems to have coexisted quite comfortably with New Criticism, which most certainly did see literature as a privileged form of discourse. See F. Lentricchia, *After the New Criticism* 166-67 (1980).

Even after the waning of the New Criticism, literature was seen as a privileged realm. Literary discourse and consciousness were simply different from, more rarified than, other forms of discourse and consciousness. In the popular jargon of modern theory, literature was constitutive, not constituted. *Id.* at 158. Other forms of discourse may not have been grounded in anything beyond the artifice of discourse, but literature was different. It then became the task of the post-structuralists like Derrida to show that all discourse is indeed “constituted,” and all is decentered, in that none can simply derive from an ontologically independent and autonomous center. All discourse is a constructed and fragile text. No text can rely on a point, origin, or end or place outside discourse from which to fix metaphysical boundaries for signifiers, and any interpretation of signifiers is another chain of signs. Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *The Structuralist Controversy* 247-48 (R. Macksey & E. Donato eds. 1972). Where Saussure saw a firm relation between signifier and signified, Derrida saw an endless chain of signifiers in the act of being different from each other. Meaning is always absent, because it is perpetually dependent upon the difference of the things that are absent. It is also “deferred” temporally because as we read more signifiers, each past one changes

Unity in contingency is thus a key feature of the meaning of "textuality." It is not just, as for structuralism, that a text participates in deeper forms of discourse. Rather, it is that the suppressed parts—the artificial devices and epistemological assumptions—are exposed and subvert the whole text.¹⁷⁶ Hence post-structuralism has ties to literary modernism, which is self-deconstructing. Thus, as the argument runs, so-called "intertextuality" is not only participative, but subversive, because it manifests the ideology of individual texts. Texts do not only reflect their own form; they also embarrass their own purported logic. This is a universal truth about writing, because it is part of all signification. All this is most evident in literature, but literature would thereby show it to be true even of law.

This approach has similar implications for history. Traditional history tries to overcome discontinuity. So in one sense of the term, Foucault is against "totalizing" history. Foucault wants history to be particular. Things do not just vary in history—they vary far more than the grand period-and-transition approach would suggest. But Foucault believes in unity or totality of discourse in another sense. He believes that at any moment in history, the supposed "spatial" distinctions among fields of discourse are an illusion. There is a unity of discourse at any historically determined moment of culture.¹⁷⁷ So temporally, Foucault argues for dispersion and against coherence. Coherence suggests too much intellectual control over discourse, but that form of control which he derogates is the control that separates. The loss of control which he observes in a particular discipline is its subjection to other disciplines.¹⁷⁸

in the new context. J. Derrida, *Speech and Phenomena* 129 (1973).

176. T. Eagleton, *Literary Theory* 132-34 (1983).

177. F. Lentricchia, *After the New Criticism* 195 (1980).

178. The attack on the privileged status of one form of discourse includes an attack on structuralism, because structuralism employs a transcendent or, to invoke another standard term, a "totalizing" model. Though it requires us to trace some regression from outer cultural forms, the regression stops at some firm, general grounding in human nature, and structuralists are not inclined to cynically describe that nature as some reductionist neurology. Structuralism may deny that people have complete control of their cultural productions, that they can individually author their texts, but it does reassure them of some referential grounding of their productions. Derrida does neither, seeing an infinite regress of analysis and interpretation.

The notion of "totality" needs some stipulation here. In a sense, Derrida is arguing against totality or unity, but in a way for it. The unity or totality Derrida opposes means the solid grounding of discourse in a reality it represents. For Derrida, unity in this sense is merely an interpretation, a postulate of practical urgency. But Derrida's *attack* on unity of *meaning* is an *assertion* of a unity of *contingency*: all discourse is like all other discourse in this sense. The unity he attacks is an autonomous unity or solidity of meaning or truth. There is, in short, unity in contingency, not unity of authority.

Foucault opposes influence, development, and evolution as denials of discontinuity. He objects to *false* forms of totalizing, such as "oeuvre," book, and phenomenological voice, along, ironically, with the division of disciplines. He does not deny unity—he wants freedom to regroup discourse along other (subversive) lines of unity ("controlled decisions"). M. Foucault, *The Archaeology of Knowledge* 126 (1976). Hence the irony that the "anti-totalizer" is a subversive "totalizer"—as opposed to the self-congratulatory "totalizer." There is nothing in Foucault that limits these insights to literature, but they are more likely to be recognized (perhaps because more harmlessly) when applied to litera-

Thus, we can glean from the deconstructionists that legal analysis fails when it takes a false, reassuring view of the unity of or totality of discourse, when it fails to see the implication of unity that undermines the assumed authority of texts. Now in a simple way, all this is just another critical attack on conventional legal doctrinal assumptions. It becomes more interesting when we use this approach to examine the scholarship that purports to be anti-conventional but ends up reinforcing convention.

III.G. DECEPTIVE UNITY

The best example in the law-literature writing of false unifying—or of suppressing the implications of unifying—is the work of James B. White. White's work, which I take to be fairly representative of the field, demonstrates that the law-literature connection is dangerous where it simply compounds cultural narrowness. The claim of an approach to law to be culturally broadening is dangerous when the apparent broadening is really a way of reinforcing a narrow view of culture and law.

In "Possibilities of American Law," White says that differences between reading literary and legal texts are largely differences in emphasis and degree of explicitness. He acknowledges that the reading of a legal

ture, so that when we make the law-literature connection, we are inevitably incorporating these insights. Hence, instead of conventional professional disciplines or genres, Foucault invents new horizontal categories such as "episteme" and "archive." See F. Lentricchia, *supra* note 177, at 204-06. Thus, in terms of literature, Foucault opposes the standard divisions of "literary history," disbelieving that the separate discipline of literature could ever have a unique history, and that the standard notions of elegant transitions between periods can describe what happens in history. The great periods, or indeed the great authors, are essentially convenient names for the convergence of forces which no authorial will can control or even be fully conscious of. We can replace the list of great authors with the list of rules and relations that brings minor voices into play with major ones. Literary history is thus really an unstable assemblage of faults, fissures, and heterogeneous layers. Culture installs its violence in new systems of rules. Rebels succeed when they seize the rules, disguise themselves to invert them, redirect them against those who had initially imposed them.

Foucault is closer to Bakhtin's critique of structuralism, which sees signs not as fixed referents, but as foci of struggles with complex political histories, though Bakhtin would recognize some relative autonomy of language. M. Bakhtin, *Marxism and the Philosophy of Language: The Formal Methods in Literary Scholarship* (1978) (with P.N. Medvedev); T. Eagleton, *Literary Theory* 116-17 (1983). Foucault also believes all texts are constituted, not constitutive, but he focuses more on the historical and political determinants of the rules of discourse at a time in history—the rules for the *episteme*, the unifying form of discourse in a culture. Texts (their authors, that is) do not realize how much they participate in each other, are subject to each other's power. M. Foucault, *The Archaeology of Knowledge* 137 (1976); F. Lentricchia, *supra* note 177, at 191.

Note that Derrida says that literature cannot be grounded by any reference to other disciplines, because those other disciplines are naked forms of discourse that have no stable non-discursive referent. Derridian "textuality" is an infinite and indefinite series of networks ruled by endless linguistic energy that recognizes no rights of bounded private ownership. *Id.* at 188. By contrast, Foucault sees *epistemes* of discourse as changeable but bounded at times by some historical determinants. Foucault agrees with intentionalists like Hirsch and Abrams that discourse may be determined, but he believes that the determining power does not lie in authorial intention imposed on language from the outside. Foucault stresses rupture and discontinuity, not tradition. He agrees with Derrida's attacks on centering and mimesis and phenomenology. But so far from being anti-history, he sees deconstruction as capable of liberating history. *Id.* at 191-93.

For a superb discussion of the persistent structuralist underpinnings of postmodernism, see Heller, *Structuralism and Critique*, *supra* n. 175.

text is less conditional—"In its own terms the legal text is authoritative . . . and law makes a real social world in a way that a work of literature does not."¹⁷⁹ But for White, the difference is consequential, not quintessential—the structure and character of the reading experience is the same. Both are cultural methods for individual and collective self-improvement. But judges are not unfettered ideologues—the law is a set of social and intellectual practices that have their own reality, force, and significance.

White has been much criticized, and the main criticism runs as follows: He is relentlessly ahistorical. He purports to release texts from the prison-house into new pluralist meaning, but in fact he is oddly dogmatic. He confirms Althusser's view that the practice of reading depends on a theory of reading which itself has an ideological base.¹⁸⁰ He never gets concrete about what different types of readers may bring to texts. He has no notion of power relations within which textual activity takes place. White believes in equality and persuadable dialog, a kind of cultural procedural due process. But all is eventually an apologia for a liberal rule of law. It is unimaginable that literature has changed, much less subverted, any view of law that he would not otherwise have had as a liberal. For White, as for the New Critics, a poem is that which resists paraphrase, a complex ineffable unity. It reflects a world of coherence and integration of parts, a world without friction, as perhaps impliedly a model for the real world, an ironic version of soft liberal pluralism. Nothing he borrows from literature ever subverts what would have been his view anyway.

My argument has a somewhat different emphasis. It is that little may be accomplished by the law-literature connection—or at least the law-as-literature connection—unless one is willing to commit us to some of the political or critical consequences of the connection. Posner, in his persistent denial of dialectical reading, denies these possibilities. White's flaws—and here I think he is widely representative of the law-literature enterprise—are subtler, because as a pretender to dialectical thinking, he co-opts them.

Though White's writing is apparently diverse, a good summary of his view of the linkage between law and literature appears in his essay "Thinking About Our Language."¹⁸¹ It shows a subtler point about White—that he purports to be a sort of quiet deconstructionist. He discovers that all laws are texts, but leaves us somewhat unclear about the inference he is drawing from the discovery of textuality, largely because he has an oddly repressed notion of the meaning of textuality. He suggests that literary discourse is more humane than conceptual discourse because it is

179. J. White, *When Words Lose Their Meaning* (1984).

180. See Hutchinson, *Book Review of When Words Lose Their Meaning*, 94 Yale L.J. 209 (1984).

181. White, *Thinking About Our Language*, 96 Yale L.J. 1960 (1986).

written in language that remains aware of how dependent it is on the contingencies of language. But his notion of contingency is biteless and disarmingly gentle, leading to self-congratulation about our cultural breadth and dialectical thinking, rather than to any of the plausibly discomfiting inferences that post-structuralism has drawn.

White says that we all participate in making language and thus

remaking our shared resources of meaning, and thus of our public or communal lives. This is obviously the case with great artists and thinkers—their work changes the terms in which we think and talk, the ways in which we imagine and constitute ourselves. . . . The ineradicable flux of language, and of the world, so recently “discovered” and lamented by the modernist who learns at last that the language and methods of science are after all not good for all forms of thought and life, is actually structural to human experience. . . . What is required to face this circumstance is not a science in the usual sense but an art—the art of reconstituting language, self, and community under conditions of ontological relativism, an art that is literary and rhetorical in character and of which we ourselves are the most important subject.¹⁸²

For White, all conduct is a form of language expression, because it is an effort of individuals to establish their sense of the significant, to establish for the world their sense of the salient. Thus, all study of culture treats all human discourse not for its scientific or referential value, but as a literary act, an expression of value and a formulation about significance. We get a tamed version of Derrida:

For all language . . . has its dangers: All languages threaten to take over the mind and to control its operation. . . . Language has real power over the mind that uses it, even the mind that contributes to its reformulation.¹⁸³

White’s standard maneuver is a form of apparently non-reductionist reductionism. This central cultural maneuver of law-literature work is that the self-consciousness about the contingency of language educates us to be skeptical about our assumptions about the world, while the pretenses of social science only reinforce the assumptions. White claims to be recognizing the implications of textuality. But for White, the art of all speech, all expression, lies in learning to qualify a language while we use it, “in finding ways to recognize its omissions, its distortions, its false claims and pretensions, ways to acknowledge other modes of speaking that qualify or

182. *Id.* at 1962-63.

183. *Id.* at 1966.

undercut it.” And as he gently imitates post-structuralism, he gently imitates Foucault:

I do not think, that is, that one sphere of life, say the economic or the intellectual, determines all the others; thus I think that there is no privileged ground of analysis upon which we can stand, no privileged subject by explaining which we can explain . . . everything else. . . . Our work cannot claim to be the kind of science that assumes a validity beyond culture, beyond language, but should hope to be a literary or rhetorical art, a way of working with and within our language.¹⁸⁴

Similarly, we get harmless anti-Cartesianism, a denial of the primacy of the thinking subject:

What we call the self is in part the history of a perpetual, and in principle unstable, negotiation between the languageless experience of the organism and its language, a negotiation parallel to those between self and nature, self and other.¹⁸⁵

The implications of textuality are wholly tameable, controllable. Merely by recognizing that we write in the thrall of language and cultural structures that taught us how to write, we can correct for the problem.

White then argues for the relevance of literature to law, saying about law that “at its central moment, the legal hearing, it works by testing one version of its language against another, one way of telling a story and thinking about it against another, and by then making a self-conscious choice between them.” Law “remakes its own language” and permits that

simultaneous affirmation of self and recognition of other [that] is the essential ethical task of a discoursing and differing humanity. These ethical possibilities arise from the fact that the premises of the legal hearing commit it to a momentary equality among its speakers and to the recognition that all ways of talking, including its own, may be subject to criticism and change. . . . The larger public world provides a less formally structured version of the same process, for language and politics work reciprocally, each changing the other, with no dominant partner.¹⁸⁶

The real implication of textuality is a purportedly liberal pluralism. The social world—and the legal world—is a play of voices, an arena of minds equally and simultaneously participating in what White likes to call rhetoric: the production of language and symbols to affirm moral significance.

184. *Id.* at 1964.

185. *Id.* at 1975.

186. *Id.* at 1963-64.

Thus White finds an easy unity of the aesthetic and the ethical, since our recognition of our mutual equality in this existential moral artistry is itself the ultimate ethical act. As with Dworkin, there are aesthetic norms even for opinions whose results he disagrees with: the "character the court gives itself in its writing, and the opportunities for thought and community it creates."¹⁸⁷ We may all write different music, but we are united by all being composers.

So this is the liberal-New Critical version of deconstructionism: It is only a mildly discomfiting form of contingency, no worse than a dash of irony and ambiguity. It is not very different from old-fashioned, New Critical "[t]olerance of ambivalence" which

has long been thought to be an essential ingredient of intellectual, emotional, and political maturity: the capacity to see, with Virgil for example, at once the greatness of Rome and its terrible cost or with Wallace Stevens at once the fictional character of the poetic world and its reality, . . . the comprising of contrary tendencies, the facing of unresolved tensions¹⁸⁸

White defines the "literary" approach as working through textual context, never through explicit concept or stipulation. Literary discourse is discourse that is self-conscious of the limits, the over-commitments, and the dead spots of language itself. White says the distinction he is drawing is not merely one between the concrete and the abstract. Rather, White urges us to be self-conscious of the tension between the concrete and abstract or of other conflicts. This is perfect for law, which always relates the concrete to the abstract and always asks: "Who are you in this text, who am I, and what kind of conversation do you seek to establish between us?"¹⁸⁹

Law is an activity that always produces new meanings, but never raises fundamental issues about authority for meaning. White talks of it as "constituted," but never describes the fragility of "constitutedness" or the power that does the constituting. That is because the constituting gets done between the rarified text and rarified reader, never intermediated through society or power. White purports to acknowledge that the social is prior to the individual, but we never see the social. He says we are compelled to live with "radical uncertainty," but he glibly finds this liberating, never threatening. Due process is seen as gentle balancing in a New Critical mode—not a crude and perhaps uneven political compromise, but a Brooksonian balancing of contrarities.¹⁹⁰

Texts are constituted, but never compelled to be what they are by in-

187. J.B. White, *Heracles' Bow* 118 (1985).

188. White, *supra* note 181, at 1972.

189. *Id.* at 1979.

190. J. White, *Heracles' Bow* 47 (1985).

tertextuality, whether a poem or a Supreme Court opinion. Thus, White misses the level at which, for example, Clare Dalton has analyzed the aesthetics of modern contract doctrine, in which smuggled imagery of women as angels or whores helps determine how judges apprehend market relations in gender relations.¹⁹¹ This imagery can be viewed as artfully constructed judicial rhetoric, but if so, it is a far more guileful and pernicious form of rhetoric than White normally attributes to judges. Conversely, if we see the judge struggling with and against the images he finds the doctrine throwing up at him,¹⁹² we sense that social mythology enters legal doctrine the way it enters fiction and drama, and must be read as a textual undercurrent subtly undermining the pretenses of the doctrinal text.

III.H. THE EXAMPLE OF CRIMINAL LAW

A good example of White's illusory cultural unity is his translation of his aesthetic ethics to the substantive criminal law. White has an essay interestingly titled "Criminal Laws as a System of Meaning."¹⁹³ It is an odd mixture of an effort to criticize and an effort to justify. White begins quite fruitfully with what I can best describe as a functional deconstruction of the standard instrumental explanations of the substantive criminal law. The standard approach is to invoke the plural purposes—general deterrence, specific deterrence, rehabilitation, retribution, and so on—and to discuss the difficulties of reconciling them. White demonstrates the flat impossibility of reconciling them, at least in the context of particular cases, because of their irreducible philosophical and functional contradictions.¹⁹⁴

Nevertheless, White ultimately finds the criminal law literally "meaningful" once we treat it as we are to treat all law, as a "constitutive rhetoric." Since White is often frustratingly vague and general about his jurisprudence, this would seem to be a very promising opportunity to find it translated into a specific set of legal problems. Particularly, here we can see what it is to take a "humanities" approach to a legal problem, to treat a specific chunk of law as a part of a larger set of literary and cultural products. The result, however, is bizarre, especially because the apparatus of criticism turns wholly on itself into an apparatus of rationalization.

The gist for White is that the real purpose of the criminal law is a cultural function called "blaming." Blaming, like all legal acts, has the function of "claiming a certain meaning for events." It is a "set of resources for claiming, resisting, and declaring significance." Blaming, spe-

191. Dalton, *Deconstructing Contract Doctrine*, 94 Yale L.J. 997, 1110-13 (1985).

192. *Id.* at 1110.

193. J. White, *Heracles' Bow* 192 (1985).

194. *Id.* at 194-203.

cifically, is a form of moral evaluation of human conduct which is best done with considerable imaginative empathy for the persons evaluated. There must be a limit to the empathy, lest we run into the problem of "*Tout comprendre, c'est tout pardonner*."¹⁹⁵

But the real reason for the limit is not the danger of excessive empathy itself, but the problem that there is a finite amount of empathy to be distributed to people with conflicting claims: If we show too much empathy for the criminal, we show too little for the victim, and vice versa. But if both criminal and actor, who might otherwise claim we are not showing them full empathy, recognize why we cannot do so, they will, in a sense, feel they have been treated with all possible empathy. And each actor in the system will therefore learn that when he engages in his own legal talk, his own constitutive rhetoric, he will learn to speak in recognition of competing rhetorics. Each speaker is composing his world, and—seeing that he is composing, not referring, and seeing that it is *his* world, and not *the* world he is composing—he will achieve ethical enlightenment in respect to others' claims of significance. "In doing this, the community claims and performs a meaning for its own action or inaction; it defines and maintains a character of its own." White acknowledges that this signifying victory for the community is the "critical achievement," because the individual actors appreciate the lesson only in the abstract.¹⁹⁶

The strange maneuvering between the individual and the collective search for meaning here demonstrates that White has not been wholly sensitive to his own constitutive rhetoric. Though he has nicely attacked narrow instrumental views of the criminal law, he has, perhaps inadvertently, disguised through rhetoric his own lapse into a kind of instrumentalism anyway. The "community" asks the individual to accept, at least theoretically, the practical constraints on his own power to have his composed world accepted. A cynic would say that all White is describing is practical interest-balancing, but more generously we can acknowledge that his community has a higher goal here: not solving instrumental problems, but defining meaning for itself.

The problem in White is the incoherent relationship between the individual and collective search for meaning. For White, integration of the forms of human discourse is a professed ideal, and, in a dimly perceived way, a reality. But for him, the center of all meaning-making is "the individual as a writing or composing mind." So when he describes social constructions of meaning, he masks political power as individualist aesthetics.¹⁹⁷ His real interest is the phenomenology of the solitary, luxuriant mind, so the tricky maneuver is to shift continually to the "our," where

195. *Id.* at 206.

196. *Id.* at 209.

197. White, *Intellectual Integration*, 82 Nw. U.L. Rev. 1 (1988).

the "our" seems to be a projection of the solitary, self-indulgent mind. His borrowing from the aesthetic is less an aesthetic appreciation of cultural reality than social reality depicted wholly from the perspective of the aesthete. It is Pater without the sensuality. What Joseph Frank said too harshly of Trilling is apposite here: It is "to endow social passivity and quietism *as such* with the halo of aesthetic transcendence."¹⁹⁸

The problem is that the individual search for meaning must be sacrificed to the collective search for meaning. In short, constitutive rhetoric at the social level is ideology, and it constrains others' search for meaning. White would seem to be missing the point that the moral-cultural "purpose" he ascribes to criminal law is, in the Durkheimian sense, still a matter of social engineering demanding individual sacrifice.¹⁹⁹ White is able to talk endlessly of "community" only because he has missed a step. For him, abstracted talk of *community* makes it possible to avoid talking about *society*.

Obviously, White remains subject to the stronger Cover-West attack that he fails to distinguish legal rhetoric, which is a direct instrument of violence, from literary rhetoric.²⁰⁰ But that stronger claim aside, White has still demonstrated the dangers of a supposedly critical view of culture that is temperamentally inclined not to be very critical at all. Indeed, the rather deflating conclusion of the essay consists of platitudes about how the jury trial, the insanity defense, and the bar on strict liability are sensible bulwarks of liberty.

III.I. THE EXAMPLE OF THE CONSTITUTION

White believes great legal documents, like great works of literature, create "community and culture," and he assumes that the Constitution is the paradigm of this creation. The Constitution seeks "to establish a national community not merely at a transcendent moment of crisis, but in its ordinary existence and over time."²⁰¹ White treats the "We" of the preamble as a confident expression of ability to speak in the first person for a united nation, not even as delegated authority, perceiving supposedly subtle distinctions between "We the People" and "We the United States" or "We the Representatives." The People are at once audience and author. The

198. See Frank, *Lionel Trilling and the Conservative Imagination*, in *The Widening Gyre: Crisis and Mastery in Modern Literature* 268 (1963). White bears essentially the same relation to the perilous implications of the law-literature connection as the Yale Derridians have been accused of bearing to Derrida. As Frank Lentricchia argues, the Yale deconstructionists replace any scary sense of the abyss with a New-Critical sense of very bounded free play, hedged with irony and ambiguity. Lentricchia describes this as a newer formalism, an odd freedom from all meaning—the idealist's aesthetic heaven. They are the Swinburnes of deconstruction. F. Lentricchia, *supra* note 177, at 183. For Lentricchia, the Yale deconstructionists tend to demonstrate that all works from all periods similarly defeat their postulates, just as New Critics tend to show that all poems are similarly ironic.

199. See J. Feinberg, *Doing and Deserving* 98-116 (1970).

200. Cover, *supra* note 20.

201. White, *When Words Lose Their Meaning* 240 (1984).

long "In order" clause establishes the grand goals toward which the people move, along with the confident verb sequence "form," "establish," "insure," and so on.²⁰² White purports to recognize the contingency of this unity, since the nation is then formally subdivided into branches and states. Once the essential unity is established, the variety and even conflict of ordinary life are permitted against that backdrop. Once again, within the body, White perceives a tension between the strong imperative tone, say, of the declaration of legislative forms and powers, and the modesty of the silent or open-ended provisions that leave the branches discretion as to how to act within their authorities, as with the "common defence and general Welfare." The text is treated like a fiduciary trust document.²⁰³

This is all standard doctrine, based on the notion that the drafters cannot see the unforeseeable. White's gently new critical approach is to see supposed doubleness, both absolute imperative authority and great silences. White then goes on to view the role of the Constitution in later daily life: as a rhetorical instrument for framing and justifying later conversations about political values. When speakers try to take up political power by rhetorical force, this document will validate or invalidate speakers' claims.²⁰⁴

To some extent, White's reading is an effort at social textualism. It treats the Constitution as encoding a script of proper political rhetoric into the frame of daily political life. It has a touch of anthropology, of structuralism about it. But in White's reading, the text has no subtext, no hidden parts—only emanations from its fairly literal reading. Its structuralist pretensions would seem to carry it beyond mere interpretation, but only so far as gentle New Criticism. It finesses any issues of indeterminacy by seeing inherent ambiguity, but the ambiguity is deliberate, controlled, unthreatening. The result is not so much an anthropological critique as a rationalized justification of the standard doctrinal reading.²⁰⁵

202. *Id.* at 241.

203. *Id.* at 244.

204. *Id.* at 245-46.

205. A more promising call to reading law as social text comes from the discussions of method in Duncan Kennedy's *Blackstone* essay. Kennedy distinguishes his approach to Blackstone from what he views as the two dominant methods of legal historiography. The first, which he calls the "natural law" method, analyzes decisions to evaluate the coherence of their rationales, to "discover the requirements of justice in particular social circumstances." The other, the instrumental, is to uncover the engine of political or economic interest that drives all supposedly disinterested lawmaking. Kennedy distinguishes his method from natural law by noting that his goal is neither an alternative rationale nor a criticism of the outcome, but the phenomenology of apology underlying formalist rationales. It differs from the instrumental in that the motives he uncovers are not the crude ones of wealth and power, but the subtler ones that "lie behind the forms of legal reasoning and categorization, rather than those that animate the choice between plaintiffs and defendants acting as stand-ins for social classes." Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buffalo L. Rev. 205 (1979).

III.J. LITERARY SUBVERSION OF THE CONSTITUTION

As Clifford Geertz has warned, the notion of social behavior as "text" is a tricky matter, a "conceptual wrench." For Geertz, the key to textuality is inscription of meaning. Thinking of textuality helps us focus "on how the inscription of action is brought about, what its vehicles are and how they work."²⁰⁶ Alton Becker lays out the main elements of the social text for the "new philologist" to investigate

the relation of its parts to one another; the relation of it to others culturally or historically associated with it; the relation of it to those who in some sense construct it; and the relation of it to realities conceived as lying outside of it.²⁰⁷

Law conceived more broadly as texts of all sorts can be read for the apprehension or representation of reality it creates, for

[t]he realization that legal facts are made, not born, are socially constructed . . . by everything from evidence rules, courtroom etiquette, and law reporting traditions, to advocacy techniques, the rhetoric of judges, and the scholasticisms of law school education.²⁰⁸

It is a representation constantly unifying the descriptive and the ethical, representing concrete situations in a language of specific consequence that is at the same time a language of general coherence. We can learn from literature about canon-building or at the opposite end gloomy indeterminacy, but the middle ground lies in close reading of differences of sensibility. It constructs social life in representing it—but we have to see it constructing the conflicts as well as the resolutions.²⁰⁹

Some writers viewing the Constitution as part of the law-literature en-

206. C. Geertz, *Local Knowledge* 30-31 (1983).

207. A. Becker, *The Imagination of Reality* 211-42 (1979).

208. C. Geertz, *supra* note 206, at 173.

209. *See id.* at 232 (legal anthropology blurs the law/fact distinction into a play of coherence images and "consequence formulae.") For a similar discussion of law from the structuralist perspective, see Heller, *supra* note 175, at 186-98.

Heller offers another perspective on reading law as a social text. He characterizes law as (a) essentially a set of local practices, and (b) essentially a cognitive and professional, rather than a normative discipline, referring to theory only in the liminal case where the content of settled practice comes into crisis. Most law consists of the hermetic reproduction of existing ritual. But

[t]o preserve the concept of a legal order as more than a haphazard collection of local exercises of power, a legal system must keep the contradictions of mutually deconstructive discourses from disturbing the reproduction in legal *theory* of its dominant symbolic representations of social organization. *Id.* at 186-88.

The core of legal work is to use and reproduce relatively arbitrary signs. Resettlement is rarely caused by large theoretical shifts, but by small, logical, analogical accommodations, sometimes by reference to theory. The system tolerates great theoretical contradiction, because theory essentially does not matter. Hence, the common law method finesses efforts at or necessities of resettlement by denying a problem exists at all or by invoking empty maxims of legislative intent, interest balancing, and so forth. *Id.* at 187-88 n. 100.

terprise have found these subtler textual conflicts. Seeking to demystify the rhetoric of the constitutional text precisely where the framers created set, contrived myths of shared, revealed truth, Robert Ferguson has shown how, in the face of gloomy visions of human imperfection and social chaos, the authors relied on "an aesthetic of conscious control," and on stylistics of "craft and guile."²¹⁰ In a similar vein, Michael Gilmore traces out an imaginative parallel between the self-conscious craftsmanship of the Constitution and the simultaneous emergence of the American novel.²¹¹ Gilmore treats the Constitution as an exercise in literary canon construction. It uses the stylistics of coldly objective, distancing, abstracted language to constrain and suppress energy that threatens hierarchy, just as the novel was emerging from the overheated passion of the sentimental novel into the detached, impersonal management of sentiment in the work, for example, of Charles Brockden Brown.²¹²

In this vein, one of the best examples of a social-textual reading that looks to the subtext and more fully exploits the literary character of the text in these terms is in John Leubsdorf's boldly deconstructionist reading of the Constitution.²¹³ Leubsdorf's "Derridian" analysis of the multi-voicedness of authorship in the Constitution is, in a sense, an act of interpretation; but it treats the Constitution more as archaeological artifact than vessel of meaning, and as a result, it discerns a problem of indeterminacy subtler and in many ways more interesting than the case-or-controversy interpretation debate. Leubsdorf identifies a far more fundamental problem of indeterminacy—an issue not of what the text is saying, but of who is saying the text. Thus, where the interpretation debaters worry in relatively conventional terms about the authority of judges to construe texts freely, Leubsdorf opens up a more insidious and fundamental question of the political authority of law.

Leubsdorf's piece is neither intentionalist nor anti-intentionalist. It is a piece of literary phenomenology that tells us much about how the framers felt about what they were framing, and treats the text as having significance far beyond intended communication. It is not so much that Leubsdorf does a deconstruction of the Constitution as that he identifies the phenomenon of constitutionalism—the act of representing and creating a state and establishing state authority.

Drawing from Derrida's own essay on the Declaration of Independence,²¹⁴ Leubsdorf poses the basic question: Who signs the Constitution? The text of the Constitution is a complex performance, not a reference,

210. Ferguson, "We Do Ordain and Establish": *The Constitution as Literary Text*, 29 Wm. & Mary L. Rev. 3 (1987).

211. Gilmore, *The Constitution and the Canon*, 29 Wm. & Mary L. Rev. 35 (1987).

212. *Id.*

213. Leubsdorf, *Deconstructing the Constitution*, 40 Stan. L. Rev. 181 (1987).

214. Derrida, *Declarations of Independence*, New Political Science, Summer 1986, at 7.

and the role of the signature on it is different from the usual separation of the signer and his signed discourse. Is the Constitution written by the framers themselves? By the states? By the people the framers represent? The problem is that if the "people" are the true authors, they are not created or identified as the relevant entity except by the document itself. Only by signing do the framers demonstrate their authorization to sign. As Derrida said of the Declaration of Independence, its authors open up a "line of political credit."²¹⁵ The result is the political version of the scriptural logos or word. The act of uttering is the act of creating all authority to utter.

Leubsdorf then applies this notion to the political complexities of the Constitution. His method of "interpretation" is to "elucidate the text's quarrels with itself." This has little to do with Posner's case-or-controversy notion of interpretation, but neither does it have anything to do with indeterminacy of meaning or political nihilism. It treats the Constitution truly academically, not as a lawyer must, but as a scholar might, to appreciate the phenomenology of authority creation. Some of the issues are substantive: the text is obviously at war with itself on slavery. But more interesting is the formal conflict of voices and authorities within the text. The text both abolishes and preserves old law. It starts history anew, yet it derives its power to do so from political precedent and freely declares itself bound by some, but not all, older law. It says what acts will bring it into effect, but they may only invoke old rules on constitution-making. The states create an entity which then tells them what to do.²¹⁶

But who speaks it? The people? The delegates? The committees? Is it law when declared or only when ratified? As Leubsdorf wonderfully shows, the whole text is in quotation marks: It says what the people will say if, given the formal processes of ratification, they choose to say it—according to this script. The formal complexity of ventriloquism here is a rich source for our understanding of more conventional concerns of "speaking-for," most obviously judicial review itself, where judges purport to say what the people or the framers have already said. Each speaker's authority comes from those for whom he speaks, yet his own voice changes the message.²¹⁷ The Constitution is a complex orgy of delegation, reflecting deep ambivalence about political power. It is as much an ironic document about power as a romantic one. Leubsdorf develops this point further by noting the drafters' ambivalent attitude toward the relationship between substance and procedure. The drafters were perfectly capable of approving substantive clauses favoring creditor, merchant, and slave-holding classes, but on the whole the inferable goal of their segmentation of

215. *Id.* at 10; Leubsdorf, *supra* note 213, at 185-90.

216. Leubsdorf, *supra* note 213, at 185-90.

217. *Id.* at 189.

power seems to be the goal of “delaying governmental action that seems irreconcilable with the Constitution’s other goal of strengthening government.”²¹⁸

This “double-mindedness about power, though it may not yield a coherent political theory, is well framed to beguile citizens who are similarly double-minded.” It offers all groups the rationalization that the substantive goals of their good factions will be achieved and those of the other factions—the bad ones—will be suppressed. The Constitution simultaneously “offers power as a goal for our hopes, and division of power as a remedy for our fears.” Where White urges us to appreciate the sonorous declamations of the Constitution, Leubsdorf wisely counsels us to hear the “hesitations” in the drafters’ voices.²¹⁹ This is the way to read, not to transcend, a text like the Constitution.

But if Leubsdorf advances our appreciation of the intrinsic subtleties of a legal text of complex social significance, we must also learn to read the wider, extrinsic emanations of a social text. As Gerald Lopez has argued, the experience of many in this country contradicts the notion of the Constitution as the source and medium of any grand unifying tradition. Lopez notes that in the Chicano experience, “constitutional interpretations and constitutional decisions reflect the provisional containment of fighting, not its transcendence.”²²⁰ Constitutions, as he argues, “result from fighting” and, in their social role, “establish the arrangements under which the fighting continues.”²²¹

The Constitutional text is the catalyst for our construction of a wider complex of vocabularies and rhetorics through which we carry on our political battles. The wider constitutional text is a large, amorphous social dialog between statements about permanent rights and statements about the contingency of particular structures of authority that produce false claims of competing rights.²²² While Leubsdorf hears a play of voices in the written text of the Constitution, we must also read histories, speeches, briefs, transcripts, manifestos and other documents so we can follow the more entangled plays for voices in which the Constitution’s formal statements get enforced and resisted, contested and renegotiated, denounced and proclaimed, rewritten and ignored, in arguments about powers and entitlements.²²³ If we are to have literary readings of the Constitution or other laws, they ought to look past the convenient text of the express political authority, and to see through deceptive unity or community, toward

218. *Id.* at 192.

219. *Id.* at 200.

220. Lopez, *The Idea of a Constitution in the Chicano Tradition*, 37 J. Legal Educ. 162 (1987).

221. *Id.* at 164-65.

222. Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All”*, 74 J. Am. Hist. 1013, 1023-24 (1987).

223. Forbath, Hartog & Minow, *Introduction: Legal Histories from Below*, 1985 Wis. L. Rev. 759, 764-65.

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the less visible stories, poems, and dramas that entangle law as they do the rest of culture. This may be the more important dimension in which law is like literature.

